APPENDIX

JUN 14 1974
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1363

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

—v.—

J. WEINGARTEN, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 8, 1974
CERTIORARI GRANTED APRIL 29, 1974

Supreme Court of the United States

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

IN THE MATTER OF:
J. WEINGARTEN, INC.

Case No. 23-CA-4401

6.20.72	Charge filed
7.17.72	Amended charge filed
8. 8.72	Complaint and notice of hearing issued
8.21.72	Respondent's answer to complaint and motion to dismiss, received
8.30.72	General Counsel's response and opposition to Respondent's motion to dismiss, dated
9. 6.72	Administrative Law Judge Arthur Leff's order on Respondent's motion, dated
9.28.72	Hearing opened
9.28.72	Hearing closed
11.21.72	Administrative Law Judge's Decision issued
12.11.72	Respondent's exceptions to Administrative Law Judge's Decision, received
12.14.72	General Counsel's statement of exceptions to the Administrative Law Judge's Decision, received
3.16.73	Decision and Order issued by the National Labor Relations Board
10. 9.73	Opinion of the court of appeals
4.29.74	Order of the Supreme Court granting certiorari

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION TWENTY-THREE

Case No. 23-CA-4401

J. WEINGARTEN, INC.

and

RETAIL CLERKS UNION, LOCAL NO. 455, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO

COMPLAINT AND NOTICE OF HEARING

It having been charged by Retail Clerks Union, Local No. 455, Retail Clerks International Association, AFL-CIO, herein called Union, that J. Weingarten, Inc., herein called Respondent, has engaged in, and is engaging in, certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, *et seq.*, herein called the Act, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the undersigned Regional Director for Region Twenty-three, pursuant to Section 10(b) of the Act and the Board's Rules and Regulations, Series 8, as amended, Section 102.15, hereby issues this Complaint and Notice of Hearing and alleges as follows:

1.

(a) The charge herein was filed by the Union on June 20, 1972, and served on Respondent by registered United States mail on or about June 20, 1972.

(b) An amended charge herein was filed by the Union on July 17, 1972, and served on Respondent by registered United States mail on or about July 17, 1972.

2.

Respondent is, and has been at all times material herein, a corporation organized and existing by virtue of the laws

of the State of Texas, having its principal offices located in Houston, Texas, where it is engaged in the retail sale of grocery and sundry items.

3.

During the past 12 months, a representative period, Respondent received goods valued in excess of $50,000, which goods were shipped directly to its Texas facilities from points located outside the State of Texas. During the same period of time, Respondent had a gross volume of sales in excess of $500,000.

4.

Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

5.

The Union is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

6.

At all times material herein, the following named persons occupied the positions set opposite their respective names, and have been, and are now, agents of Respondent, acting on its behalf, and are supervisors within the meaning of Section 2(11) of the Act:

Monroe Rochester	—Vice-President, Personnel
Joe Perry	—Assistant Personnel Director
Joe York	—Store Manager, Store No. 98

7.

At all times material herein Don Hardy, Loss Prevention Specialist, has been, and is now, an agent of Respondent, acting on its behalf, and is an agent within the meaning of Section 2(13) of the Act.

8.

Respondent, by its officers, agents, and supervisors, since on or about June 15, 1972, has interfered with, restrained and coerced, and is interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, by the following acts and conduct:

On or about June 15, 1972, Store Manager York required employee Leura Collins to be present and submit to an interview in his office at Respondent's Store No. 98, where Store Manager York and Loss Prevention Specialist Hardy interviewed Collins concerning her having allegedly engaged in the unauthorized removal of company property; having allegedly misappropriated company funds and/or other property of value; and allegedly having taken company property without paying full value therefor, while at all times denying Collins' repeated requests to have her Union representative present at such interview.

9.

All employees in the J. Weingarten, Inc., retail stores, excluding all Korner Pantry type stores, located in the Texas Counties of Harris, Brazos, Waller, Fort Bend, Brazoria, Grimes, Montgomery, Liberty, Chambers, Galveston, Hardin, Jefferson, Jasper, Newton, and Orange, excluding store managers, assistant store managers, management trainees, meat department managers, employees working in the meat department, employees in the delicatessen departments in those stores where the delicatessen department is consolidated with the meat department, non-food department managers, nursery center employees, employees employed in the stamp redemption centers which are located physically apart from the Employer's retail grocery stores, office clerical employees who work separately and apart from the retail grocery stores, professional employees, guards, watchmen, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

10.

At all times material herein, a majority of the employees in the unit described above in paragraph 9 have designated or selected the Union as their representative for the purposes of collective bargaining with Respondent.

11.

At all times material herein, the Union has been the representative for the purposes of collective bargaining of the employees in the unit described above in paragraph 9, and, by virtue of Section 9(a) of the Act, has been, and is now, the exclusive representative of all the employees in said unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

12.

Commencing on or about June 15, 1972, and at all times thereafter, Respondent did refuse, and continues to refuse, to bargain collectively with the Union as the exclusive collective bargaining representative of all the employees in the unit described above in paragraph 9, in that Respondent, on or about June 15, 1972, unilaterally changed existing wage rates and terms and conditions of employment by discontinuing giving free lunches to employee Leura Collins and other employees, and has, upon repeated demands by the Union for the reinstatement of the free lunches, continued to refuse to give free lunches as had been Respondent's past practice.

13.

By the acts and conduct described in paragraphs 8 and 12 above, and by each of said acts, Respondent did interfere with, restrain and coerce, and is interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, and is engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

14.

By the acts described in paragraph 12 and by each of said acts, Respondent has refused, and is refusing to bargain collectively with the Union, and thereby did engage in, and is engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and Section 2(6) and (7) of the Act.

15.

The acts of Respondent described in paragraphs 8 and 12 above, occurring in connection with the operations of Respondent described in paragraphs 2, 3 and 4, above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

16.

The acts of Respondent described above constitute unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5), and Section 2(6) and (7) of the Act.

PLEASE TAKE NOTICE that on the 28th day of September, 1972, at ten o'clock in the forenoon (CDST) in Room 214, Dallas-Brazos Building, 1125 Brazos Street in the city of Houston, Texas, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the above Complaint, at which time you will have the right to appear in person or otherwise and give testimony. Form NLRB 4668, Summary of Standard Procedures in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Proceedings, is attached.

YOU ARE FURTHER NOTIFIED that, pursuant to Section 102.20 and 102.21 of the Board's Rules and Regulations, Respondent shall file with the undersigned Regional Director, acting in this matter as agent of the

National Labor Relations Board, an original and four (4) copies of an Answer to said Complaint within ten (10) days from the service thereof, and that unless it does so, all of the allegations in the Complaint shall be deemed to be admitted to be true, and may be so found by the Board.

Dated at Houston, Texas, this 8th day of August, 1972.

/s/ Clifford W. Potter
CLIFFORD W. POTTER
National Labor Relations Board
Region Twenty-three
Dallas-Brazos Building
1125 Brazos Street
Houston, Texas 77002

SUMMARY OF STANDARD PROCEDURES IN FORMAL HEARINGS HELD BEFORE THE NATIONAL LABOR RELATIONS BOARD IN UNFAIR LABOR PRACTICE PROCEEDINGS PURSUANT TO SECTION 10 OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED

The hearing will be conducted by a Trial Examiner of the National Labor Relations Board. He will preside at the hearing as an independent, impartial trier of the facts and the law and his decision in due time will be served on the parties. His headquarters are either in Washington, D.C. or San Francisco, California.

At the date, hour, and place for which the hearing is set, the Trial Examiner, upon the joint request of the parties, will conduct a "prehearing" conference, prior to or shortly after the opening of the hearing, to assure that the issues are sharp and clear-cut; or he may, on his own initiative, conduct such a conference. He will preside at any such conference, but he may, if the occasion arises, permit the parties to engage in private discussions. The conference will not be recorded, but it may well be that the labors of the conference will be evinced in the ultimate record—for example, in the form of statements of position, stipulations, and consessions. Except under unusual circumstances, the Trial Examiner conducting the prehearing conference will be the one who will conduct the hearing; and *it is expected that the formal hearing will commence or be resumed immediately upon completion of the prehearing conference.* No prejudice will result to any party unwilling to participate in or to make stipulations or concessions during any prehearing conference.

(This is not to be construed as preventing the parties from meeting earlier for similar purposes. To the contrary, the parties are encouraged to meet prior to the time set for hearing in an effort to narrow the issues.)

Parties may be represented by an attorney or other representative and present evidence relevant to the issues.

An official reporter will make the only official transcript of the proceedings, and all citations in briefs and arguments must refer to the official record. The Board will not certify any transcript other than the official transcrip for use in any court litigation. Proposed correctness of the transcript should be submitted, either by way of stipulation or motion, to the Trial Examiner for his approval.

All matter that is spoken in the hearing room while the hearing is in session will be recorded by the official reporter unless the Trial Examiner specifically directs off-the-record discussion. In the event that any party wishes to make off-the-record statements, a request to go off the record should be directed to the Trial Examiner and not to the official reporter.

Statements of reasons in support of motions and objections should be specific and concise. The Trial Examiner will allow an automatic exception to all adverse rulings, and, upon appropriate order, an objection and exception will be permitted to stand to an entire line of questioning.

All exhibits offered in evidence shall be in duplicate. Copies shall also be supplied to other parties. If a copy of any exhibit is not available at the time the original is received, it will be the responsibility of the party offering such exhibit to submit the copy before the close of hearing. In the event such copy is not submitted, and the filing thereof has not for good reason shown been waived by the Trial Examiner, any ruling receiving the exhibit may be rescinded and the exhibit rejected.

Any party shall be entitled, upon request, to a reasonable period at the close of the hearing for oral argument, which shall be included in the stenographic report of the hearing. In the absence of a request, the Trial Examiner may himself ask for oral argument, if at the close of the hearing he believes that such argument would be beneficial to his understanding of the contentions of the parties and the factual issues involved.

Any party shall also be entitled upon request made before the close of the hearing, to file a brief or proposed

findings and conclusions, or both, with the Trial Examiner who will fix the time for such filing.

Attention of the parties is called to the following requirements laid down in Section 102.42 of the Board's Rules and Regulations with respect to the procedure to be followed *before* the proceeding is transferred to the Board:

No request for an extension of time within which to submit briefs or proposed findings to the Trial Examiner will be considered unless received by the Chief Trial Examiner in Washington, D.C. (or, in cases under the San Francisco, California branch office of Trial Examiners, the Associate Chief Trial Examiner in charge of such office) at least 3 days prior to the expiration of time fixed for the submission of such documents. Notice of request for such extension of time must be served simultaneously upon all other parties, and proof of such service furnished to the Chief Trial Examiner or Associate Chief Trial Examiner, as the case may be. All briefs or proposed findings filed with the Trial Examiner must be submitted in triplicate, and may be in typewritten, printed, or mimeographed form, with service upon the other parties.

In due course the Trial Examiner will prepare and file with the Board his decision in this proceeding, and will cause a copy thereof to be served upon each of the parties. Upon filing of the said decision, the Board will enter an order transferring this case to itself, and will serve copies of that order, setting forth the date of such transfer, upon all parties. At that point, the Trial Examiner's official connection with the case will cease.

The procedure to be followed before the Board from that point forward, with respect to the filing of exceptions to the Trial Examiner's Decision, the submission of supporting briefs, requests for oral argument before the Board, and related matters, is set forth in the Board's Rules and Regulations, Series 8, as amended, particularly in Section 102.46, and following sections. A summary of the more pertinent of these provisions will be served upon the parties together with the order transferring the case to the Board.

Adjustments or settlements consistent with the policies of the Act reduce government expenditures and promote amity in labor relations. Upon request, the Trial Examiner will afford reasonable opportunity during the hearing for discussion between the parties if adjustment appears possible, and may himself suggest it.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
TWENTY-THIRD REGION

Case No. 23-CA-4401

[Received Aug. 24, 1972, Div. of Trial Examiners, NLRB, Wash., D. C.]

J. WEINGARTEN, INC.

and

RETAIL CLERKS UNION, LOCAL NO. 455, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO

ANSWER TO COMPLAINT AND MOTION TO DISMISS

TO THE HONORABLE NATIONAL LABOR RELATIONS BOARD:

NOW COMES J. Weingarten, Inc. hereinafter called "Respondent" and files this its Answer to Complaint on file herein and its Motion to Dismiss certain allegations in the Complaint, and by way of such Answer and such Motion would respectfully show the following:

FIRST DEFENSE

I.

Respondent admits the allegations of Paragraph 1 of said Complaint.

II.

Respondent admits the allegations of Paragraph 2 of said Complaint.

III.

Respondent admits the allegations of Paragraph 3 of said Complaint.

IV.

Respondent admits the allegations of Paragraph 4 of said Complaint.

V.

Respondent admits the allegations of Paragraph 5 of said Complaint.

VI.

Respondent admits the allegations of Paragraph 6 of said Complaint.

VII.

Respondent admits that Mr. Don Hardy is an employee of the Respondent but denies that Mr. Hardy is an agent acting on behalf of Respondent within the meaning of Section 2(13) of the Act.

VIII.

Respondent denies the allegations of Paragraph 8 of said Complaint.

IX.

Respondent admits the allegations of Paragraph 9 of said Complaint.

X.

Respondent admits the allegations of Paragraph 10 of said Complaint.

XI.

Respondent admits the allegations of Paragraph 11 of said Complaint.

XII.

Respondent denies the allegations of Paragraph 12 of said Complaint.

XIII.

Respondent denies the allegations of Paragraph 13 of said Complaint.

XIV.

Respondent denies the allegations of Paragraph 14 of said Complaint.

XV.

Respondent denies the allegations of Paragraph 15 of said Complaint.

XVI.

Respondent denies the allegations of Paragraph 16 of said Complaint.

SECOND DEFENSE

I.

That at all times material hereto, a valid collective bargaining Agreement was in existence between Retail Clerks Union Local No. 455, chartered by the Retail Clerks International Association, AFL-CIO, hereinafter referred to as the "Union," and the Respondent covering wages, hours, and conditions of employment, and which provided in Article XVIII, a dispute procedure providing for the exclusive method of processing and settling of "any differences, disputes, or complaints" arising "over the interpretation or application of the contents of this Agreement," and for final and binding arbitration of all such differences, disputes, or complaints which also includes disputes concerning fringe benefits of the employees covered thereunder.

II.

Respondent has at all times material hereto been ready and willing to submit to arbitration under the Agreement between the Respondent and the Union, the issue concerning the alleged unilateral changing of wage rates and terms and conditions of employment regarding the discontinuing of giving free lunches to employee Leura Collins and other employees.

III.

During the course of the investigation herein, the Twenty-Third Regional Office was informed by Respondent and the Union and of the Respondent's willingness

to proceed to arbitration over the matter concerning the alleged discontinuance of free lunches.

IV.

The Union herein at all times material hereto has failed to file a grievance and to proceed to arbitration under the Agreement.

V.

That the Agreement herein provides for voluntary, final and binding dispute and arbitration procedures and it has not been claimed that the alleged unilateral action of the Respondent undermines the Union, that the action of the Respondent is based upon a substantial claim of contractual privilege under the Management Rights provisions of the Agreement and that it appears that the arbitrable interpretation of the Agreement will resolve both the unfair labor practice issue and the contract interpretation issue in a matter compatible with the purpose and policies of the National Labor Relations Act, hereinafter referred to as the "Act," and the Board should defer the subject matter of the Respondent's alleged refusal to bargain allegations to the voluntary settlement procedures mutually agreed upon by the parties. *Collyer Insulated Wire*, 192 NLRB No. 150 (Aug. 20, 1971), *Bethlehem Steel Corp. (Shipbuilding Division)*, 195 NLRB No. 121 (June 21, 1972), and *Southwestern Bell Telephone Co.*, 198 NLRB No. 6 (July 31, 1972).

WHEREFORE, PREMISES CONSIDERED, Respondent respectfully prays that said Complaint be dismissed and denied in its entirety and that Respondent have such other and further relief as it may show itself justly entitled, or, in the alternative, that Respondent's Motion

to Dismiss be granted and that certain allegations of said Complaint be dismissed.

Respectfully submitted

FULBRIGHT, CROOKER & JAWORSKI

By /s/ L. G. Clinton, Jr.
L. G. CLINTON, JR.
NEIL MARTIN
800 Bank of the Southwest Building
Attorney for Respondent,
J. Weingarten, Inc.

CERTIFICATE OF SERVICE

I, L. G. Clinton, Jr., one of the Attorneys for J. Weingarten, Inc., do hereby certify that on the 18th day of August, 1972, I have served a true and correct copy of the foregoing Answer to the Complaint and Motion to Dismiss on the party listed below by mailing a copy thereof through the United States Mail, postage prepaid;

Mr. James P. Wolf
Dixie, Wolf & Hall
609 Fannin Street Building
Suite 401
Houston, Texas 77002

/s/ L. G. Clinton, Jr.
L. G. CLINTON, JR.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D. C.

Case No. 23-CA-4401

J. WEINGARTEN, INC.

and

RETAIL CLERKS UNION, LOCAL NO. 455, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO

ORDER ON RESPONDENT'S MOTION

The Respondent having filed as part of its Answer to the Complaint herein a Motion to Dismiss the refusal-to-bargain allegations of the Complaint; the General Counsel having filed a Response and Opposition to the said Motion; and the said Motion having been duly referred to the undersigned for disposition; now, after consideration of the aforesaid papers and the pleadings in this proceeding,

IT IS HEREBY ORDERED that the Respondent's Motion be, and the same hereby is, denied. The Complaint alleges in substance that the Respondent on or about June 15, 1972: (1) violated Section 8(a)(1) by denying the request of employee Leura Collins to have her union representative present at an interview at which she was to be interrogated concerning alleged misappropriation by her of Company funds and/or property; and (2) violated Section 8(a)(5) of the Act by unilaterally discontinuing giving free lunches to employee Leura Collins and other employees. Respondent's Motion to Dismiss appears to be addressed solely to the 8(a)(5) allegations of the Complaint. The Motion is predicated on the ground that the issue relating to the alleged unlawful unilateral action is one that should be deferred to the grievance and arbitration procedures which Respondent states are contained in an existing collective bargaining agreement

between the Charging Union and the Respondent that provides, *inter alia*, for the processing and settling of "any differences, disputes, or complaints" arising "over the interpretation or application of the contents of this agreement." The Respondent in its Motion asserts, but only in conclusory language, that its unilateral action complained of "is based upon a substantial claim of contractual privilege under the Management Rights provisions of the Agreement." The Respondent has not, however, attached to its motion papers, a copy of the collective bargaining agreement to which it refers. Nor has it set out in its motion papers the Management Rights provision on which it would support its claim of contractual privilege. I have thus no means for determining from the papers before me whether Respondent's claim of contractual privilege is indeed a substantial or even a colorable one which might make this an appropriate case for application of the *Collyer Insulated Wire* doctrine (192 NLRB No. 150). In sum, I find that no sufficient evidence has been submitted by Respondent to support its Motion, which is in effect a motion for partial summary judgment relating to the 8(a)(5) allegations of the Complaint, and that a hearing is therefore required on the issue presented.

/s/ Arthur Leff
ARTHUR LEFF
Administrative Law Judge

Dated: September 6, 1972
Washington, D.C.

[1]

BEFORE THE
NATIONAL LABOR RELATIONS BOARD
TWENTY-THIRD REGION

In the Matter of:
J. WEINGARTEN, INC.

—and—

RETAIL CLERKS UNION, LOCAL NO. 455, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO

Room 214
1125 Brazos Street
Houston, Texas
Thursday, Setpember 28, 1972

The above-entitled matter came on for hearing pursuant to notice, at 10:00o'clock a.m.

BEFORE:

HONORABLE JOSEPH I. NACHMAN, Administrative Law Judge

APPEARANCES:

WILLIAM H. HELMS, Esq., 1125 Brazos, Houston, Texas; appearing on behalf of the General Counsel.

NEIL MARTIN, Esq., (Fulbright, Crooker & Jaworski), 800 Bank of the Southwest Building, Houston, Texas; appearing on behalf of the Respondent.

* * * *

[3] PROCEEDINGS

JUDGE NACHMAN: The hearing will be in order, please.

This is a formal hearing before the National Labor Relations Board in the matter of J. Weingarten, Inc., Case No. 23-CA4401.

* * * *

[4] MR. HELMS: At this time, I'll offer into evidence the formal papers. They have been marked for identification as General Counsel's Exhibit Nos. 1(a) through 1(j)

inclusive, 1(j), being an index and description of the entire exhibit.

[5] This exhibit has already been shown to all parties.

JUDGE NACHMAN: Any objection?

MR. MARTIN: No objection.

JUDGE NACHMAN: GC 1 will be received.

(The documents above-referred to were marked for identification as General Counsel's Exhibit Nos. 1(a) through 1(j) and were received in evidence.)

MR. HELMS: At this time, I'd like to ask the reporter to mark for identification as General Counsel's Exhibit 2, a booklet purporting to be a bargaining agreement between the Charging Party union and—

JUDGE NACHMAN: Can you gentlemen stipulate as to the authenticity of that document?

MR. MARTIN: Your Honor, it's our intent to mark this for identification, and by stipulation enter it into the record.

JUDGE NACHMAN: All right.

It will be marked as GC 2.

(The document above-referred to was marked General Counsel's Exhibit No. 2 for identification.)

JUDGE NACHMAN: I understand the parties stipulate to the authenticity of the document—

MR. MARTIN: Just one moment, sir.

The Employer will so stipulate.

JUDGE NACHMAN: All right.

[6] You stipulate its receipt into evidence, I take it?

MR. MARTIN: Yes, sir.

GC-2 will be received.

(The document heretofore marked General Counsel's Exhibit No. 2 was received in evidence.)

* * * *

[23] JAMES C. PHILLIPS

was called as a witness by and on behalf of the National Labor Relations Board, * * *

DIRECT EXAMINATION

Q. (By Mr. Helm) Mr. Phillips, how are you employed?

A. I'm Business Representative for the Retail Clerks Union.

* * * *

MR. HELMS: Would you state your name for the record?

THE WITNESS: James Phillips, 6001 Gulf Freeway, Houston, Texas.

Q. (By Mr. Helms) Now, Mr. Phillips, you say you're a Business Representative for the Retail Clerks.

Is that Local No. 455?

A. Yes, sir.

Q. How long have you been such a representative?

A. About six and a half years, I believe.

Q. And during this six and a half years, have you had occasion to deal with Weingartens?

A. Yes, sir.

Q. How were you employed prior to the time you became a business representative for the Retail Clerks?

A. I was a produce manager employed by Weingartens.

[24] Q. And do you recall when the first contract negotiations were held between Weingartens and the Retail Clerks?

A. Yes, sir.

I served on the negotiating committee at that time.

Q. Do you recall when that was?

A. It was in 1965, I believe. March of '65.

Q. Do you recall the negotiations very well?

A. Yes, sir.

Q. Do you recall whether or not this matter of free lunches in Weingarten's stores was subject to negotiations?

A. To my knowledge, it never was a subject of any of the negotiations that I attended.

Q. Have the Retail Clerks had constant contractual relationships with Weingartens since 1965?

A. Yes, sir.

Q. Are you, in general, familiar with the negotiations between Weingartens and the Retail Clerks since that time?

A. To some degree, yes, sir.

Q. To your knowledge, has the question of free lunches ever been a question raised during negotiations or any of the contracts?

A. To my knowledge, it has never been.

* * * *

[26] Q. Were you aware of the situation concerning free lunches in the lobby department as distinguished from a lunch counter type operation?

A. I knew that the lunch departments always received the free lunches.

Q. Were you acquainted with the lobby department situation?

A. As far as my knowledge about the lobby department's not receiving them, that's never came up until this issue here.

JUDGE NACHMAN: You just didn't know it existed one way [27] or the other, whether it existed or not?

THE WITNESS: I just knew it existed in the lunch departments and that was it.

Q. (By Mr. Helms) Mr. Phillips, how did you learn about the lunch problem arising, one of the subjects of this case? How did you find out about it?

A. This was through a discussion with Leura Collins, after she had been interviewed, or was talked to at Weingartens No. 98, and through the discussion with her, this was when it arised.

Q. Do you recall about when that discussion was?

A. Well, in the first—there was a couple of times I talked to her, and I believe it was four or five days after the incident happened is when I talked to her the first time on it. I'm not sure about that.

Q. All right.

What action did you take in connection with what she reported to you, if any?

A. Well, I had a telephone conversation with Perry, I believe—

JUDGE NACHMAN: With who?

THE WITNESS: With Mr. Joe Perry, the assistant personnel director of Weingartens, and I stated to him that I felt that it was wrong in taking away these lunches out here because of the fact that it was taking some of their [28] benefits.

A few days after that, or some days after that, we filed a written grievance on it—or the representative of that store filed a written grievance on it.

JUDGE NACHMAN: You mean a grievance under the contract?

THE WITNESS: Yes.

Q. (By Mr. Helms) Has that grievance been processed?

A. No, sir.

JUDGE NACHMAN: Well, why hasn't it been processed? Because you don't want to go ahead with it, or the company doesn't want to go ahead with it?

THE WITNESS: One reason we held off on it was because of the Board case.

JUDGE NACHMAN: You're holding it up pending the outcome of the Board case?

THE WITNESS: Yes, sir.

Q. (By Mr. Helms) Now, you say you told Mr. Perry you thought it was wrong to take away these free lunches.

Did Mr. Perry—what did he say to you, if anything?

A. He stated it was a company policy that it eixsted in all lobby departments, that there was no free lunches. It only existed in the lunch departments.

JUDGE NACHMAN: Mr. Phillips, who made the decision not to go ahead with the grievance pending the outcome of the Board case? Was it the union's position, the company's [29] position, or who? Did you both agree on it?

THE WITNESS: No, sir, that was the union's position at that time, that—after it was filed, this was scheduled for a hearing, and we decided to wait, pending the outcome of this.

JUDGE NACHMAN: So, as far as you know, then, the company would always be willing to pursue the grievance?

THE WITNESS: The company has not denied the grievance or anything else as far as proceeding, to my knowledge.

JUDGE NACHMAN: So far as you know, they've perfectly willing to proceed under it?

THE WITNESS: As far as I know, they probably are.

JUDGE NACHMAN: All right.

Q. (By Mr. Helms) Mr. Phillips, as an employee—how were you an employee of Weingartens?

A. For a time, I believe I was there about 10 years, if I'm not mistaken. Ten or eleven. Something like that.

Q. As an employee, were you familiar with what action would be taken in connection with an employee who had taken money or merchandise from the store without paying for it?

* * * *

[33] Q. (By Mr. Helms) Mr. Phillips, in the recent past, say, in the last two years in your union capacity, have you had occasion to deal with the subject of theft from, or dishonesty on the part of a Weingarten employee?

A. Yes, sir.

Q. Could you pinpoint the latest time?

A. That would be kind of hard to say within the last—do you want the last two years here?

Q. Yes, sir.

A. Well, there's one incident that I believe happened in the last two years at one of the stores involved.

Some members of yours that were kids that I called—they were all teenagers, that were marking down discount merchandise to each other for—the checker was checking it out to them at a discount.

JUDGE NACHMAN: You mean the price on the merchandise was reduced?

[34] THE WITNESS: Right.

In other words, the items like a Hostess type ham I think was $12, and she marked it down to a dollar, or something like that. This kind of stuff. All of these were terminated.

JUDGE NACHMAN: Well, did you have any discussions with the company about it?

THE WITNESS: Yes, sir, I met with the supervisor, and at that time, the security people—

JUDGE NACHMAN: What was the company's position on that?

THE WITNESS: That they were stealing.

JUDGE NACHMAN: The company's position was that they were stealing. It was a dishonest act for which they were discharged?

THE WITNESS: Right.

There's many other ones that's more recent than that one, I believe. I'd have to go back to check the files to get dates and times for you if you wanted them.

JUDGE NACHMAN: Well, could you give me in a general way how many times you've had discussions with the company about alleged acts of dishonesty on the part of employees, and what position, if any, that the company took about them?

THE WITNESS: Well, if you pinpointed it in the last two years, it's going to be kind of hard, because basically a representative is filing grievances in the stores when this comes up and he is discussing this more at length when [35] it comes up as to whether it's dishonesty in that—

JUDGE NACHMAN: This takes place before you're called in?

THE WITNESS: The third step, or the last step is usually—if I'm going to get into a grievance, it's there. I don't usually get in on the beginning of a grievance.

JUDGE NACHMAN: How many occasions have you had to take it up with the company, matters of this kind?

THE WITNESS: In the last two years, it's very few, and the position that they've taken where dishonesty existed, and it was either through an employee admitting it or something like this, there was termination.

JUDGE NACHMAN: Go ahead.

Q. (By Mr. Helms) Have you known of any situation where dishonesty was established, that there was any other penalty besides discharge?

A. Not to my knowledge, no.

* * * *

CROSS EXAMINATION

[36] Q. (By Mr. Martin) Mr. Phillips, do you have personal knowledge of the policy of the company regarding thefts and related discipline to be meted out in every case?

A. Do I have personal knowledge of it?

Q. Yes.

A. Now, I don't know as far as personal knowledge. I only know the position that the company takes in each individual case.

Q. When they deal with you, right?

A. When they deal with me.

So, as far as having a policy—a copy of a set policy that they may have in existence, I don't know of any.

* * * *

Q. How many would you estimate within the last two or three years, how many cases of dishonesty involved your direct discussions with someone of the company in a management position?

A. Well, that I was actually involved in would probably be two or three, something like this.

Q. Two or three in the last two or three years?

A. Yes, something like that. It's hard to say.

* * * *

[39] MR. MARTIN: I'll ask the reporter to mark as an exhibit, Respondent's Exhibit No. 1.

JUDGE NACHMAN: This will be R-1. I'm marking this as Respondent's R No. 1.

(The document above-referred to was marked Respondent's Exhibit No. 1 for identification.)

Q. (By Mr. Martin) Mr. Phillips, looking at Respondent's No. 1, which has been marked for identification, can you identify this particular document?

[32] A. This is a copy of the grievance that was filed at Weingarten's No. 98 by John P. McCauley, business representative of the union, in dealing with the free lunches out there.

JUDGE NACHMAN: Is this dated?

MR. MARTIN: Is the date that appears on line number one, June 20, '72, is that the date on which this particular grievance was filed?

THE WITNESS: I would not be able to tell you, because I didn't file it. The business representative did. I believe you could probably check the date stamp where the company received it, and find out—

Q. (By Mr. Martin) Well, my question is, do you know when it was filed?

A. No, I do not know what date it was filed.

Q. Do you Mr. McCauley? Mr. John B. McCauley?

A. Yes, he's a representative of ours.

Q. With the Retail Clerks Union, No. 455?

A. Right.

JUDGE NACHMAN: He works under your supervision? You coordinate his activities?

THE WITNESS: Yes, sir, to a degree, yes, sir.

MR. MARTIN: We offer Respondent's Exhibit No. 1 into evidence.

JUDGE NACHMAN: Does this involve the particular employee involved in this case?

[41] MR. MARTIN: I'll ask the witness. It does not appear from the face of the document—

Q. (By Mr. Martin) Mr. Phillips, does this grievance involve Mrs. Collins and other employees of the store, No. 98?

A. It involves the lobby department of Weingartens No. 98, and it includes all employees.

Q. Mrs. Collins was at that time an employee?

A. She was at that time an employee in that department.

MR. MARTIN: We offer Respondent's Exhibit No. 1.

JUDGE NACHMAN: Any objection?

MR. HELMS: No objection.

JUDGE NACHMAN: It will be received.

(The document heretofore marked Respondent's Exhibit No. 1 was received in evidence.)

Q. (By Mr. Martin) Correct me if I'm wrong, Mr. Phillips, in response to a question earlier by the Administrative Judge, you said that you had no knowledge of the

policy of the company with regards to lunches in the lobby department before this date, is that correct?

A. Repeat that. I think you misunderstood.

Q. Well, maybe so.

My question is, did you testify earlier that the first time you knew about the policy in the lobby department was today when the company stated it's position before we went on the record with testimony?

[42] A. The only policy that I was aware of that dealt with the free lunches was, they existed in the lunch departments. The lobby, I assumed they were treated the same way. I did know one way or the other until this incident came up.

Q. Until this incident occurred?

A. Yes.

Q. And the way that you found out about that, you discussed it with Mr. Perry, is that right?

A. I discussed it with Leura. She was the one that brought it up about them not having free lunches, or the doing away with it. Then, I discussed it with Mr. Perry a few days later.

* * * *

Q. Is it a fact, Mr. Phillips, that you've had discussions with Mr. Perry within the last couple of years regarding some employees who were eating from stock where in those [43] cases those employees were not, in fact, discharged or disciplined in any way?

A. It would be—

Q. Sir?

A. To my knowledge, it would be hard to answer yes or no, but I presume I have, because there's many things we discuss over a period of time.

* * * *

[46] Q. Well, isn't it a fact that you had a discussion with Mr. Perry where this was—where no disciplinary action was taken in a case where employees were determined to be grazing in the store?

A. And as I answered earlier, if I have, to my recollection right now, I could not name you a time, place or anything else. Because, if I have—I probably have. I'll

agree there. But to when, or what was discussed, I do not remember at this time.

* * * *

LEURA COLLINS,

was called as a witness by and on behalf of the National [47] Labor Relations Board, * * *

DIRECT EXAMINATION

Q. (By Mr. Helm) Would you please state your name and address for the record?

A. My name is Leura Collins and I live at 3121 Mooney.

Q. Is that here in Houston?

A. In Houston, yes, sir.

Q. All right.

And how are you employed, Mrs. Collins?

A. I work—I was working in the lobby at the time that this occurred.

Q. What store was that?

A. Ninety-eight.

Q. How long have you worked for Weingartens?

A. Going on 11 years.

Q. How long have you worked at Store No. 98?

A. I went there when the store opened. I believe that was around a year—a little over two years. I don't know just when that store opened. I can't rememeber.

MR. HELMS: Could we have a stipulation as to when store No. 98 opened?

MR. MARTINS: We're prepared to stipulate that store No. 98 was opened October 26, 1970; and further that Mrs. Collins began employment on that date at the store.

[48] MR. HELMS: So stipulated.

JUDGE NACHMAN: Stipulation is approved.

Q. (By Mr. Helms) Did you work in the lobby department at all times in that store?

A. Yes, sir.

JUDGE NACHMAN: What do you mean by the lobby department? What is that?

THE WITNESS: Well, we serve lunches, and we sell barbecue chickens, links, beef—

JUDGE NACHMAN: For customers to take out or to eat there?

THE WITNESS: To take out or eat there.

JUDGE NACHMAN: That's different from the lunch counter?

THE WITNESS: Well, it's somewhat different. I mean, they serve lunches.

JUDGE NACHMAN: Well, it's a different department than the lunch counter?

THE WITNESS: Well, yes, I guess you would call it different.

JUDGE NACHMAN: All right.

Q. (By Mr. Helms) Had you previously, before going to work at store No. 98, worked in a lunch department?

A. Yes, sir, that was where I was hired, in the lunch department.

Q. Now, I take it that stores that have a lobby department do not also have a lunch department?

[49] A. Yes, sir, this one had a lunch department. We served plate lunches.

Q. Well, is the lunch department part of the lobby department at store No. 98?

A. Yes, sir.

Q. Is there a difference between a lobby department and a lunch department?

A. Well, yes, sir, I guess there are, because we sell more barbecue, I guess, you know. Barbecue chickens, we specialize more in that.

Q. All right.

Prior to the time that you were employed at store No. 98, had you been receiving free lunches, Mrs. Collins?

A. Yes, sir.

Q. What was the situation about the lunches after you went to work at store No. 98?

A. I was never told any different, that I was supposed to pay for my lunches. No one ever told me any different.

Q. Now many employees work in the lobby department at store No. 98?

A. Well, we have Jewell; Edna, she worked in there sometimes, the manager. And we have Sherry, and we

have Pauline, and—I believe it was about five or six. Some of them was parttime.

Q. Have you worked during lunchtime at sometime or another [50] during your course of your employment there with all of those employees that you named?

A. Yes, sir.

Q. Incidentally, do you have the last names of these people?

A. I believe Pauline Russian (sic) was her name, and Edna Odoms, and—I don't know Jewell's last name. And Sherry, I don't remember her last name.

Q. Do you know whether or not these other people, including the manager, Edna Odoms, also received free lunches at store 98?

A. Yes, sir, they all received free lunches.

Q. They received free lunches during the entire time that you were there?

A. Yes, sir.

Q. Who were you hired by initially by Weingartens, do you recall?

A. I believe Mr. England, and Billy Algood, at No. 2 on Jenson.

Q. Do you recall what, if anything, was said about free lunches at the time you was hired?

A. Yes, sir, they told me that I got one lunch free, and a drink.

JUDGE NACHMAN: One lunch a day?

THE WITNESS: Yes, sir.

Q. (By Mr. Helms) Are you a member of the Retail Clerks?

[51] A. Yes, sir, I've been one for about five or six years. Something similar to that.

Q. Now, directing your attention to June 14th of this year, could you tell us what—or did you go to store No. 90 that day?

A. Yes, sir, I was scheduled to work that day, but before I went to work, my church that I was going to was having a dinner, and I went there to purchase a dollar's worth of chicken and a loaf of bread and a cake, and I paid Jewell, I gave her the money for the stuff, and I left and

went to the church, taking the chicken, and then I returned to work.

Do you want me to go on?

Q. Yes, go ahead.

A. So, I worked that day, and I believe it was the next day, or the next, I was told that Jewell was to go upstairs and talk about being transferred to another store.

So, she went up and she came down and said that they had asked her to go to another store, and she refused.

So, Mr. York came down and told Edna—

JUDGE NACHMAN: Who is Mr. York?

THE WITNESS: Mr. York, he's the manager.

JUDGE NACHMAN: The manager of 98?

THE WITNESS: Yes, sir.

He told Edna that he wanted to talk to me upstairs, and I thought it was to, you know, go to another store.

[52] So, he came back down and said that there was too many people up there, that he would call me later.

So, a little later on, he came down and said that he was ready for me, and I went upstairs. Mr. York and the detective was sitting up there.

Q. (By Mr. Helms) Do you know the detective's name?

A. No, sir.

He introduced himself, but I didn't remember his name.

Q. Do you see him in this room?

A. Yes, sir.

That's him over there.

Q. The gentleman in the green shirt?

JUDGE NACHMAN: The man on the right or the man on the left?

THE WITNESS: He's on this side of Mr. York.

MR. HELMS: Mr. York is on the end there?

THE WITNESS: On the end, yes, sir.

So, he introduced himself and told me who he was and asked me my name and address and how long I had worked for Weingartens, and I told him.

So, he told me he wanted to talk to me about some stuff that I had gotten from Weingartens, $3.50 worth of chicken, and I paid a dollar for it. I told him that I didn't get that amount of chicken, that I got a dollar's worth of

chicken, a loaf of bread and a cake, and I paid Jewell for it.

[53] So, I began to feel then, you know, that something was going to happen, and I got scared about my job, and I asked could I have Billie—

JUDGE NACHMAN: Could you have what?

THE WITNESS: Billie, the union representative there, with me.

Q. (By Mr. Helms) Who is Billie? Do you know her last name?

A. Billie Brockett.

Q. Is she an employee of Weingartens?

A. Yes, sir.

Q. You say she's also a union representative or steward?

A. Union stewardess, yes, sir.

Q. Go ahead.

JUDGE NACHMAN: I take it she works at store No. 98?

THE WITNESS: Yes, sir.

So, they told me no, that I couldn't have it.

Q. (By Mr. Helm) Who told you that?

A. Mr. York did.

So, they went on to question me about this and he said—the detective told me that I had been putting money in my shoe, and I told him that I had trouble with my feet and I had been wearing houseshoes and I just stuck them out and I said, "How do you think that you could money in a shoe like this?"

[54] He said, "Well, you've been putting money in your pocket when you would take like a dollar and some change for a sale," that I would ring the change up and keep the dollar and put it in my pocket.

So, I told him that I had been working at Weingartens for 11 years and I'm the only support that me and my son has, and I would not take a chance on losing my job.

So, he went on and talked to me about that. He asked me had I taken anything from Weingartens without paying for it.

I told him no, that I hadn't, that I paid for everything I got.

He said that everyone at sometime taken things from Weingartens including himself and Mr. York, without paying for it. And he said, "Don't sit there and tell me that you haven't taken anything."

And I said, "Sir, I haven't taken anything from Weingartens except my lunch and not paying for it."

And Mr. York raised up then and said, "Since when have you—was you getting your lunch free?"

I said, "Mr. York, ever since I went to work for Weingartens, 11 years ago. They told me that I got my lunch free and I've never been told any different."

So, I again asked Mr. York—the detective went downstairs to ask the other girls were they getting their lunches free.

[55] JUDGE NACHMAN: The other girls where?

THE WITNESS: Downstairs in the lobby.

JUDGE NACHMAN: Did you go with him?

THE WITNESS: No, sir.

JUDGE NACHMAN: You don't know who he talked to?

THE WITNESS: No, sir.

So, then he got on the telephone and used the telephone. I don't know who he talked to. I couldn't hear it.

Q. (By Mr. Helms) Was the telephone there in Mr. York's office?

A. Yes, sir, it was off to the side.

JUDGE NACHMAN: In his private office, where the telephone was?

THE WITNESS: It's all upstairs, but his office was sort of over to the side.

JUDGE NACHMAN: Well, why couldn't you hear what he was saying?

THE WITNESS: Well, it was off over from us. We were sitting back—

JUDGE NACHMAN: You were too far away?

THE WITNESS: Yes, sir.

So, I asked Mr. York, I said—I commenced to crying and I told him, I said, "I'm not scared of being accused of something I haven't done because I haven't done anything, but could I have Billie up here with me, the union representative."

[56] And he said, "No." He said, "That's why I'm here."

He said, "Let me put it like this. If you go to the bathroom, we all three go."

So, the detective came back and sat down and talked a little while and he made up a deal where I said—

Q. What do you mean "he made out a deal?"

A. A statement saying that I had gotten my lunches.

JUDGE NACHMAN: You mean he wrote out a statement?

THE WITNESS: Yes, sir.

He typed it out and he said that I owed Weingartens around a hundred and sixty something dollars. I don't remember the exact number, and he wanted me to sign this deal, this form.

So, I refused to sign it, and so they kept insisting that I sign this form, and I told them no, that I wasn't going to sign it, that I needed my job, and I didn't know, you know, how that would effect my job.

So, the telephone rang about this time and the detective answered it and he came back after he got through talking on the phone, and he jerked this slip out and tore it up and told Mr. York that I was right, that they had said that we would get our lunches.

So, I had asked several times for Billie or the union representative and they refused me every time.

So, after he had gotten this telephone call, Mr. York told me that I could go home for the rest of the day, have [57] it off, on account of being embarrassed.

I told him that I wasn't embarrassed because I hadn't done anything and I had paid for everything that I had gotten.

He said that he wanted to ask two favors of me, to not mention that to anyone—

Q. (By Mr. Helms) Now, who asked you this?

A. Mr. York said to not mention it to anyone about it, because if anyone found out about it, I would be the one to tell it. He wouldn't tell it, and to take off and go home that evening.

So, I went home. At about 4:30 after Billie Brockett got off, she called me to find out what happened and I told her what had happened.

The next morning I called the union and told them about it.

Q. Was there anything else said to you by Mr. York or by Mr. Hardy upstairs there that you recall?

JUDGE NACHMAN: Who is Mr. Hardy?

MR. HELMS: The detective. It's in the complaint, sir.

I believe he is a Loss Prevention Specialist, is his title.

JUDGE NACHMAN: In the complaint—

MR. HELMS: In the complaint, they deny—

JUDGE NACHMAN: Oh, I see where he's got it.

MR. HELMS: Paragraph 7, "Don Hardy, Loss Prevention [58] Specialist."

JUDGE NACHMAN: Yeah, that's denied. That paragraph is denied. They denied that he's an agent.

I just want the record to be clear. You mentioned his name. I want to know who they are.

Can you gentlemen stipulate that the so-called detective is Mr. Hardy?

MR. MARTIN: Yes, we'll stipulate that Mr. Hardy, Mr. Don Hardy is an employee of Weingartens, is not a detective for any law enforcement agency, is a Loss Prevention specialist with the company.

MR. HELMS: I believe that part is admitted in the answer, Your Honor.

JUDGE NACHMAN: All right.

Q. (By Mr. Helms) OK, now.

Was anything else said by Mr. Hardy or Mr. York upstairs that you recall?

A. Well, they were some other words spoken, but I can't recall, you know—

Q. Do you recall if he said something as to about being in a financial bind?

A. Yes, sir.

The detective asked me, he said, "I realize, "—you know, I had been off on sick leave and he said, "Now, it could be that you're in a financial way, and you need some help. [59] Weingartens would try to help you."

I told him, "No." that I wasn't in no bind, that I was getting by just like everyone else. It was nothing extra,

but I was getting by, that I was the only support for me and my son, and we was making it all right.

Q. Now, Mrs. Collins, do you know whether or not prior to this day that Mr. York knew whether you were getting free lunches or not?

A. No, sir, I don't really know whether he did or not.

Q. You indicate that there in his office, this seemed to be something new to him?

A. Yes, sir.

JUDGE NACHMAN: Do you know whether the other employees in the lobby department got their lunch there every day?

THE WITNESS: Yes, sir.

JUDGE NACHMAN: Did they pay for it?

THE WITNESS: No, sir, they got them free.

JUDGE NACHMAN: You know this?

THE WITNESS: Yes, sir.

I went back downstairs and the girls talked about it, said they didn't know it theirselves, and they had been getting them.

JUDGE NACHMAN: All right.

Go ahead.

Q. (By Mr. Helms) How long did you continue after that [60] date to get free lunches?

A. I don't really recall. I believe it was the next day or so we was told that we was supposed to pay for our lunches.

Q. Who told you?

A. Edna Odoms.

JUDGE NACHMAN: She's the manager of that department?

THE WITNESS: Yes, sir.

MR. HELMS: Pass the witness.

CROSS EXAMINATION

* * * *

Q. (By Mr. Martin) Mrs. Collins, when you were employed 11 years ago or so in store No. 2, did they have a lunch counter?

A. Yes, sir.

Q. In store 14 where you worked, I think you testified
[61] they had a lunch counter there too, is that right?
A. No. 14? No, sir, they have a lobby.
Q. They have a lobby.
A. Yes, sir.
They called it "lobby", but they do have lunches.
JUDGE NACHMAN: Did you ever work at store No. 14?
THE WITNESS: I'm in No. 14 now.
Q. (By Mr. Martin) You were transferred, then, to store No. 62, is that correct?
A. Yes, from No. 2 to 62.
Q. Did they have a lunch counter?
A. Yes, sir.
Q. Was that in about 1968 when you were transferred? Do you recall?
A. Yes, sir, I believe around there.
Q. Did you receive free lunches there?
A. Yes, sir.
Q. When you were transferred from store 62, you went directly to store No. 98, did you not?
A. Yes, sir.
Q. Was your classification at store No. 62 different than from store No. 98?
A. Yes, sir. I was in the lobby. They call it the lobby.
Q. In what department were you in store 62? What was your classification?
[62] A. Lunch counter.
Q. Were you present at any of the meetings, orientation meetings that were held prior to store No. 98 opening its doors to the public?
A. No, sir.
Q. Do you know whether or not there were such orientation meetings held between employees and management?
A. No, sir, I don't.
Q. What are Edna Odoms duties? Do you know what she does?
A. Well, she mostly attended to the bakery, but she was the manager over the lobby and the bakery, but she was the bakery—

MR. MARTIN: We would invite, Your Honor, a stipulation from Counsel for the General Counsel, if possible, that Mrs. Edna Odom is an employee in the bargaining unit covered by the contract.

JUDGE NACHMAN: I didn't know there was any question about that.

MR. MARTIN: Well, the title is a manager. In some stores, certain managers in certain departments are included in collective bargaining agreements, and in some stores they are not. I'm trying to establish that so we wouldn't have to go into questioning in this particular issue, by stipulation that—

JUDGE NACHMAN: See if General Counsel will stipulate.

[63] MR. HELMS: So stipulated, that this Edna Odoms is a unit employee.

Q. (By Mr. Martin) When were you transferred to store 14 from store 98, Mrs. Collins? Do you recall?

* * * *

THE WITNESS: I really don't recall the exact—because I've been—I was off on sick leave after this other happened.

I think it's been—I don't really know exactly, about six or seven weeks, I believe. Something similar to that.

Q. (By Mr. Martin) Did you request to be transferred?

A. Yes, sir.

Q. Was your classification changed?

A. No, sir.

Q. Was your salary changed?

A. No, sir.

Q. Mrs. Collins, when you were asked to come to talk to Mr. York, where did this conversation occur with Mr. York?

We know it occurred in store 98, but where in the store, do you recall?

[64] A. Upstairs in the lounge where he has his office, over the lobby department.

Q. Is the lounge partitioned? His office partitioned in any way from the rest of the lounge?

A. No, sir.

Q. You do not know, or is it partitioned?
A. No, sir, it's not got a partition in it.
Q. As I understand then, it's all an open area?
A. Yes, sir.
Q. Is it a fact that he has a desk up there that he uses?
A. He has it over in front there, you know, in front of the lounge.
JUDGE NACHMAN: Your conversation with Mr. York was some distance away from his desk?
THE WITNESS: Yes, sir.
Q. (By Mr. Martin) Where did the conversation occur in that lobby area?
A. Well, his desk was sort of over in the front and we was back a good ways from his desk.
Q. Were you at a table?
A. Yes, sir.
Q. An ordinary lounge type table?
A. Yes, sir, the ones they eat on up there.
Q. Was the interview conducted in any area where you were partitioned from the lobby at all?
[65] A. No, the lobby is downstairs and we were upstairs.
Q. I'm sorry.
The lounge.
My question is, while you were being interviewed, isn't it a fact that you were in full view of everyone who would come up into the lounge area?
A. If they come up in there, yes, sir.
Q. Did you ever request, Mrs. Collins, that the interview be terminated?
A. Put that—
Q. Did you ever ask for them to stop the questioning? Did you ever say, "I've just had enough," or "I want to stop."
A. No, sir, I didn't know I could do that.
Q. How long did the interview last? Do you know?
A. Well, I don't know exactly because I didn't look at the clock, but it was somewhere about around an hour and a half.
Q. What did you discuss aside from what you related on direct examination?

A. I don't understand your question.

Q. Well, on direct examination you testified as to certain conversations that occurred between Mr. York, Mr. Hardy, and you, is that correct?

A. I still don't understand what you mean.

JUDGE NACHMAN: Well, Mr. Helms was asking you some [66] questions. You told him about certain conversations that you had up there.

THE WITNESS: Yes, sir, the questions and things that they asked.

JUDGE NACHMAN: Well, Counsel wants to know, did you talk about anything else?

THE WITNESS: No, sir.

Q. (By Mr. Martin) Did you talk for the entire approximately one hour and a half on just what you testified on direct examination, is that correct?

A. Yes, sir.

Q. Now, it's a fact, isn't it, Mrs. Collins, that no one has ever told you that you were not entitled to free lunches at store No. 98, is that right?

A. No one ever told me that I wasn't supposed to get lunches.

Q. Isn't it a fact, Mrs. Collins, that when you first talked about union representation there in this interview, that you told Mr. York, "shouldn't the union be present?"

A. No, sir, I asked him if I could have one of them up there with me.

Q. What words did you use, do you recall?

JUDGE NACHMAN: In other words, repeat exactly what you told Mr. York at that time.

THE WITNESS: Well, I asked Mr. York if I could have [67] Billie, the union representative—I mean, the union stewardess up there or a union representative, and he said no, that's why he was there.

Q. (By Mr. Martin) Did you ever use any other words that you recall at any other time that you made this statement about union representation except, "Could I have Billie or the union stewardess up there?"

A. No, sir, I always asked if I could have Billie, the union stewardess or a union representative, and they refused me.

Q. Is that—Mr. Hardy refused you as well as Mr. York—

A. I think I referred to Mr. York, asking him.

Q. So, Mr. York refused you, is that correct?

A. Yes.

Q. And what exactly did he say?

A. Well, he told me no a time or two, that I couldn't, that that was why he was there. I asked him over if I could have them and he said no, that's why he was there, and that—he said, "Let me put it like this. If you go to the bathroom, we all three go."

Q. Did Mr. York ever say anything about it being a personal matter or a private matter between you and the company?

A. No, sir.

Q. Did he ever say anything about not wanting to get other employees involved during the interview?

[68] A. No, sir.

Q. Did he ever say that he was asking you about, or going to ask you about your alleged participating in theft?

A. I don't quite.—

Q. Did he ever say he was going to ask you about your being involved in stealing money?

A. No, sir.

Q. Did they ever say during the interview that they were going to ask you about taking food without paying for it?

A. Nothing was ever said about that until he asked—the detective asked me had I ever taken anything from Weingartens, and I told him that I had never taken anything from Weingartens without paying for it, but my lunch.

And that's when it came up.

Q. At the beginning of the interview, were you apprehensive about your job? Were you afraid for your job at the beginning of your interview?

A. Yes, sir, I was because I'm the only that supports me and my son, and that's the only way I have of making a living.

Q. Isn't it a fact, though, that you believed when you went to the interview that it was about a transfer?

A. Yes, sir. That's what I thought it was about.

Q. So, when the interview began, you were not concerned about your job status with the company, were you?

A. Sir?

[69] Q When the interview began, were you concerned about or fearful for you job?

A. Well, when I found out what it was all about. yes, sir. I was scared for my job because I knew that I had not done anything.

Q. Answer my question, Mrs. Collins.

At what point did you feel like that you—that your job was exposed to danger, and what caused you to feel that way?

A. Because others had lost their jobs in signing papers, and it was misrepresented to them, and I was afraid that I would sign this paper and something else would be put on it like I had been told.

Now, I don't know this to be sure, but I have been told that it happened. And that's what made me feel that my job was in danger, because this form that he typed up where we got our lunches, he wanted me to sign this. And others had signed papers, and they had said other stuff had been put on there and they had lost their jobs, and that was what I was afraid.

I asked Mr. York if I had to sign it, and he said, "Well, it's your own words."

Q. Do you recall when you were asked to sign the paper as far as—was it late in the interview, at the beginning, the middle, or can you place it as far as time? Wasn't it [70] toward the end of the interview after you had gotten through all of the discussion that it was being typed, after it was typed—

A. During the conversation—the conversation was going on about the chicken and stuff, that he had brought up.

Q. But didn't he ask you sign it—hand it to you and ask you to sing it and that's when you became concerned about your job?

A. No, sir, he never did hand it to me. He told me that he was going to fix this out in my words, and they wanted me to sign it saying that I owed Weingartens.

Q. And you owed them because of what reason?
A. The lunches.
Q. The free lunches, is that right?
A. Yes, sir.
Q. After the interview was terminated, isn't it a fact that Mr. York asked you if you wanted to have the rest of the day off?
A. No, sir, he told me I could take off.
Q. Was there any reason for you to be concerned, or were you concerned about taking free lunches?
A. No, sir, I wasn't because I was told that I was supposed to get my lunches, and I was never told any different.
Q. And you had not engaged in any theft, is that right.
A. No, sir.
[71] Q. So, you weren't afraid of them asking questions about theft, were you?
A. No, sir.
Q. Since the interview, have you had occasion to discuss what happened with anyone other than the union stewardess?
A. No, sir. I usually talk with her, and I did talk with Mr. James Phillips.
JUDGE NACHMAN: You didn't talk to any employee?
THE WITNESS: No, sir.
Q. (By Mr. Martin) What did you talk about with Mr. Phillips, do you recall, about this incident?
A. Well, I just explained to him about what happened?
Q. And what did he say?
A. He didn't say anything. I called him out to listen to my story, and that's all there was to it.
Q. Did he tell you that you might have to testify in a hearing such as this one?
A. Well, now, we hadn't discussed that, I don't believe, at all.
Q. Do you have personal knowledge, Mrs. Collins, have you ever seen Mr. York observe any employee in the

lobby department taking a free lunch, to your personal knowledge?

A. Do I what, sir?

Q. Have you ever seen Mr. York see someone, yourself or any other person in the lobby department, take a free lunch?

[72] A. I really don't know. I couldn't say.

Q. The skill that you use being a lobby department employee, is it any different from being a lunch counter or lunch department employee? Do you do different things?

A. Well, as far as I'm concerned, it's practically the same thing, because we serve lunches, sandwiches, hamburgers, and all of this, and we serve barbecue where I came from in the lunch department, and, the only thing is it's just built different.

Q. How is it built different?

A. Well, the bakery and the lobby is together, see, and I've never worked—where I worked at 62 and No. 2, the bakery was separate from the lunch counter, and in this, they're combined.

Q. Do you prepare different types of foods, one versus the other?

A. Yes, sir, we just, you know, sort of make a plate lunch. You know, different things every day. We make up our own menu usually.

Q. Is the work more difficult in the lobby department than it is in the lunch department, in your opinion?

A. Well, to some extent, yes, sir.

MR. MARTIN: Pass the witness.

JUDGE NACHMAN: Any redirect?

REDIRECT EXAMINATION

[73] Q. (By Mr. Helms) Mrs. Collins, you testified a while ago when I was asking you questions, you testified that you cried while you were upstairs.

A. Yes, sir, I did.

Q. What caused you to cry?

A. Because I knew the Lord had answered my prayers. I had prayed that the Lord would let me hold my job,

and that I would sign nothing that was supposed to be saying something wrong, and that I will have my job. And I knew the Lord had answered my prayer, and I told Mr. York and the detective that I knew that He had answered my prayers, that I had done nothing wrong.

Q. Mrs. Collins, I believe you also testified, when you started talking about this, after you got upstairs for this interview, that they said something to you about getting $3.50 worth of chicken and only paying a dollar for it.

A. Yes, sir.

Q. Do you know whether or not there was any sort of basis for that question on their part?

A. I don't quite understand—

Q. Well, what kind of boxes are chicken put in?

A. Well, we had a large box and a small box to put chicken in, and the small boxes, we were out of.

Q. Now, when was that? Was that the day before when you were taking it over to the church dinner?

[74] A. Yes, sir, we had been out of them a good while. So, in order to carry it decent looking and everything, I put it in this large box.

Q. And is that large box—is there a standard price for that large box?

A. Yes, sir, it was for the larger orders of the chicken.

JUDGE NACHMAN: What is the price charged for that larger box? What do you get when you get the amount of food that's supposed to be in that box?

THE WITNESS: I believe—we don't sell too much of that where we are right now, and the prices sort of get away with me.

What I got was four pieces for a dollar, and I believe—I'm not sure, but I believe they're two ninety-nine —I really don't remember, sir. I'm sorry.

JUDGE NACHMAN: Is there a charge, say, like three dollars and a half for it?

THE WITNESS: No, sir, I don't think we have any special charge at this price, unless they just want some special pieces. You know, breasts or thighs, or something similar to that.

Q. (By Mr. Helms) Now, on the day of the questioning, after the interview was over, were you ready to go back to work?

A. Yes, sir, I would have worked.

Q. What did you do?

[75] A. I went home.

JUDGE NACHMAN: You went home because Mr. York told you to take the rest of the day off?

THE WITNESS: Yes, sir.

Q. (By Mr. Helms) How many hours did you miss that day?

A. I believe it was about four hours. I'm not sure. Something like that, because I think it was around 1:00, or a little after 1:00 or something like that, when I came down.

Q. Did you ever get paid for that four hours?

A. Yes, sir.

Q. Do you know why you got paid for the four hours?

A. No, sir, I never asked any questions about it.

Q. Was it in your regular paycheck?

A. Yes, sir. I got a regular 40 hour—

MR. HELMS: That's all I have.

MR. MARTIN: Just one or two more questions.

RECROSS EXAMINATION

Q. (By Mr. Martin) What time did you go to work on the day that this questioning occurred?

A. I believe—I'm not sure, but I believe it was around 10:00 or 10:30 or 11:00.

Q. OK.

Do you have a scheduled lunch break or lunch period?

A. No, sir, we don't have no certain time.

Q. What do you normally take for lunch?

[76] A. Well, it's really different times, you know. It's just how busy we are, and how many we have working.

Q. Do you always eat a lunch there?

A. No, sir, not always.

Q. How often would you take a lunch, or use the facilities of the company for a free lunch before the interview occurred?

A. Well, I really don't know. Some days I wasn't hungry and I wouldn't eat. Maybe I would take a drink.

Then, some days I might eat one vegetable or two vegetables or something like that. I don't know. Just—

Q. So, sometimes you did eat and sometimes you did not eat?

A. Yes, sir.

Q. Do you recall just about when the interview began? When did it occur?

JUDGE NACHMAN: You mean what time?

MR. MARTIN: Yes, sir.

THE WITNESS: I don't know exactly.

Like I said a while ago, I didn't look at the clock, but I believe it was somewhere around lunch.

Q. (By Mr. Martin) When is the busiest time for you during the day over at store No. 98 where you were working?

A. The busiest part of the day?

Q. Uh-huh.

Is it lunchtime?

A. Well, around 12:00, 12:30 or 1:00, I would say.

[77] Q. OK.

Was it before or after or during this busy part of the day for you that you were asked to go up into the lounge area?

A. Well, I guess it was somewhere during this time.

Q. During the busy part of the day?

A. Yes, sir, I really didn't notice the time. I couldn't say for sure.

Q. Well, what I'm trying to find, Mrs. Collins, did the work slack off? Did the people stop coming in because—

A. Well, I don't think so.

Mr. York let Edna come over and work in my place, see, while I went upstairs.

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DON HARDY

was called as a witness by and on behalf of the Respondent,

* * * *

DIRECT EXAMINATION

Q. (By Mr. Martin) Mr. Hardy, would you state your name and address for the reporter, please?

A. Don Hardy, 4522 Weingarten Street.

Q. And by whom are you employed, Mr. Hardy?

A. J. Weingarten Incorporated.

Q. And how long have you been employed by Weingartens?

A. Approximately eight and one half months.

Q. In what capacity.

A. Loss Prevention Specialist.

Q. Mr. Hardy, what are your duties as a Loss Prevention [80] Specialist?

A. As a Loss Prevention Specialist, I'm assgined to those area that might conceivably result in a loss a Weingarten facility. My duties include inspections of stores when a shrink, or a loss problem is discovered, trying to verify where the loss is.

My duties also include making recommendations about various ways stores are set up, prior to the store opening to prevent loss.

Q. In the investigation of losses, you investigate what types of incidents? Is it related to what, thefts only?

A. No, sir, all types of incidents of loss that occur.

Q. In connection with your duties, Mr. Hardy, are you armed with any sort of sidearm or weapon, anything of this nature?

A. No, sir.

Q. Do you have any sort of constituted authority from any law enforcement agency?

A. No, sir, not in connection with this employment.

Q. Before you were employed with Weingartens, had you had any experience in loss prevention activities?

A. Yes, sir.

Q. What was that?
A. The Kroger Company.
Q. How long were you employed there?
A. Approximately three years.
[81] Q. In the same capacity that you are with Weingartens?
A. No, sir, I was an investigator with Kroger Company.
JUDGE NACHMAN: Was it the same general type of duties?
THE WITNESS: Yes, sir, the same general type of duties.
Q. (By Mr. Martin) Do you have any employees under your supervision?
A. No, sir, I don't.
Q. Do you have any authority to hire or fire any employee of Weingartens?
A. No, sir, I do not.
Q. Have you ever been given authority to make recommendations concerning discipline for any employee of Weingartens?
A. No, sir.
Q. Does the—
JUDGE NACHMAN: If you caught an employee engaged in some act of dishonesty or pilferage, what would you do?
THE WITNESS: In the act, sir?
JUDGE NACHMAN: Yes.
THE WITNESS: Apprehension of that employee at that time.
JUDGE NACHMAN: All right.
Now, you've caught him.
What would you do?
THE WITNESS: I'd refer the man to my supervisor.
JUDGE NACHMAN: You could take no action on your own?
THE WITNESS: No, sir.
[82] JUDGE NACHMAN: All right.
Q. (By Mr. Martin) Does the company have any sort of policy—does it have a policy relating to your

activities in interviewing employees? Are you working under any sort of company policy or procedure?

A. Yes, sir.

Q. Would you describe what that is, please?

A. I don't know if I understand the question.

Q. My question is, do you have any guidelines when you interview an employee of the company, and if so, what are the guidelines?

A. Well, the guidelines—what type of particular interview?

Q. Are you instructed to advise any employee at the commencement of the interview of any particular matter? Do you have to identify yourself?

A. Yes, I have to identify myself.

Q. That's part of the company policy?

A. That's part of the company policy, yes.

Q. Do you have to advise him of the purpose of the interview?

A. No, sir.

Q. Do you have to inform him of any constitutional rights?

A. No, sir.

Q. Are you under any instruction from the company as to how you conduct the interview? Can you conduct the interview alone?

[83] A. Can I conduct an interview alone?

Q. Yes.

A. Yes.

Q. Is there a policy favoring or disfavoring this?

A. The policy generally favors conducting the interview by myself with the employee, with no other person present.

Q. If an employee that you are interviewing demands to end the investigation, what are you instructions in that regard?

A. To end the interview.

Q. Would you tell us briefly what caused you to be in the store No. 98 on June the 15th?

A. Yes, sir.

June the 15th, I believe, was a Thursday.

On Tuesday of that week, my supervisor, Mr. Hal Burnett instructed me to go to 98 and check out an allegation that a person in the lobby department at that store was taking money from the cash register.

He identified this person from his source of information and I don't know—

JUDGE NACHMAN: Did he give you a name?

THE WITNESS: Yes, sir, Leura Collins.

I went to this store on that day and went to the snack bar area, or the lobby department, and observed the operation of the department at around lunchtime.

[84] I went also on Wednesday at that same time and observed the snack bar area of the lobby department. I observed no removal of cash from the cash register, or no dishonest acts whatsoever, that I could see.

I returned to the store on Thursday and went to Mr. York, the store manager, and informed him that I had been in the store in an undercover capacity for two days, and I observed nothing of a dishonest nature going on in the lobby department.

At that time, on Thursday, it was around lunchtime. Mr. York and I had lunch together. Mr. York told me that he had been informed by one of the store employees that on the previous day, Leura Collins had taken $3 worth of chicken and only paid a dollar for this chicken.

Q. Did he identify the employee that furnished him that information?

A. He did at that time. He said that this employee was Jewell Moody.

Q. What did you do as a result of that information that Mr. York gave you?

A. After we finished lunch, I asked Mr. York to have Jewell Moody come to his office area where I could interview her regarding the information she had given to him.

JUDGE NACHMAN: Was this the Mrs. Moody employed in the lobby department?

[85] THE WITNESS: Yes, sir.

Q. (By Mr. Martin) Would you describe the area in which you conducted the interview of Mrs. Moody?

A. Yes, sir.

It's an open area over the lobby department, which is used as a manager's office, one portion of this area; and the inner portion of the area is used as an employee lounge, break area.

The area where I interviewed Mrs. Moody was at Mr. York's desk, the manager's office portion of this particular area.

Q. Are there any partitions in this portion—

A. No, sir.

Q. What transpired between you and Mrs. Moody? What was said between you and Mrs. Moody?

A. I asked Mrs. Moody if she had any knowledge of any dishonest acts occurring in the lobby area on the previous day, and she said yes, that she did; that another employee in that area—she was somewhat reluctant to identify her to me, but she did—another employee of that area had taken $3 worth of chicken, and only paid $1 for this chicken.

Q. Did she identify the employee?

A. Yes, she identified Mrs. Collins.

Q. OK.

Was there anything else said?

A. No, sir, not at that time.

[86] Q. What happened then, Mr. Hardy?

A. Mrs. Moody returned to work and I asked Mr. York to ask Mrs. Collins to come to the upstairs area over the lobby department.

JUDGE NACHMAN: Did you interrogate Mrs. Moody as to how she knew of this act she was reporting to you?

THE WITNESS: Yes, sir.

She told me she observed it.

JUDGE NACHMAN: Did she give you the details?

THE WITNESS: She told me that it was in the morning of the previous day, that—

JUDGE NACHMAN: How did she know it was $3 worth of chicken, that's what I'm getting at.

THE WITNESS: She said she observed this transaction.

JUDGE NACHMAN: What did she observe? Did she observe her putting the chicken into the box?

THE WITNESS: She said she did, yes, sir, at that particular time.

JUDGE NACHMAN: What I'm getting at, there's some testimony here that they used a large box to put a lesser quantity of chicken in.

Now, did you get information from her that would either verify or contradict that?

THE WITNESS: Well, at that time, I didn't know that the large box and the small box came into play. [87] MR. MARTIN: I think, Your Honor, that the testimony later on that will be introduced will clear up this point.

JUDGE NACHMAN: All right.

At that point, you didn't know that there was this distinction between the large box and the small box?

THE WITNESS: No, sir.

JUDGE NACHMAN: All right.

Go ahead.

Q. (By Mr. Martin) Did Mr. York bring Mrs. Collins to the lobby—I mean, to the lounge area for you to question?

A. Yes, sir.

Q. What was said at that time?

A. Mrs. Collins came to the lounge area and we had a table arranged in the lounge area where three people could sit at this table, and Mr. York introduced Mrs. Collins to me.

Q. How did he identify you, do you recall?

A. No, sir, I don't recall.

Q. Did he say that were a detective?

A. No, sir, I believe he said I was from the security department.

Q. Of the company?

A. Yes, sir.

Q. Continue.

A. Mrs. Collins was seated at the table and I told her that I was checking into the situation that happened —that [88] occurred yesterday, and asked her if she had purchased some chicken from the store on that particular day, and she said yes, she had.

At that time I asked her if she had paid the full price of the chicken on that particular day, and she said she had.

I asked her if she had not, in fact, paid for—paid $1 for $3 worth of chicken.

At this point in the interview, Mrs. Collins said, "Shouldn't the union be in on this?"

At that time, Mr. York said—told her that it was a private matter between the company and herself, and I continued asking questions regarding the chicken, if she did not pay any less for the chicken than what it was actually worth.

JUDGE NACHMAN: She denied having paid less than the value?

THE WITNESS: Yes, sir.

During this questioning she said that on the previous day, she had gotten a large chicken box, but only put a dollar's worth of chicken in this box, because she said—and she sounded truthful about it, so I decided to go downstairs and verify that they were out of chicken boxes, the small chicken boxes on that particular day.

Q. (By Mr. Martin) Who did you talk to?

A. Mrs. Collins—I mean, Mrs. Moody.

[89] Q. What did she say to you?

A. She said that she remembered then that they were out of small chicken boxes on Wednesday, and I said, "Well, then, Mrs. Collins couldn't have gotten a small box of chicken. Any box she got would have had to have been a large chicken box."

And she said, "That's right."

And I said, "Well, did you see how many pieces of chicken she put in this box?"

She said, "Well, no, not really."

Well, at that point, it became apparent to me that we didn't have the information we thought we had in the first place. So, I returned to the area where Mr. York and Mrs. Moody were sitting and told them that I had verified this information from Mrs. Moody downstairs, and as far as I was concerned, the matter was cleared up.

JUDGE NACHMAN: In other words, you were convinced that there was, in fact, no act of dishonesty on Mrs. Collins part? At least, you couldn't prove it?

THE WITNESS: I don't know if there was any act of dishonesty or not, but at that point, I was in a place I shouldn't have been. I had no reason talking to the woman because, there was no dishonesty evident.

Q. (By Mr. Martin) Did the interview end at that point?

JUDGE NACHMAN: I didn't hear the last couple of words [90] you said.

THE WITNESS: There was no dishonesty evident, at that point.

Q. (By Mr. Martin) Did the interview end?

A. No, sir.

Q. Why did it continue?

A. Well, about this point, I believe—I don't know why—

At this point, I don't know why, Mrs. Collins had become emotional. She had tears in her eyes, and she said to myself, and mostly to Mr. York, "I have never taken anything from the company that I haven't paid for except for the free lunches." We continued the interview then because I didn't know that—this surprised me. Free lunches weren't—they weren't supposed to be getting free lunches as far as I knew.

Q. Did you ask Mr. York at that time anything about the lunches?

A. Yes, I said, "Joe, did you know—are they supposed to get free lunches?"

He said, "No."

Q. OK.

What did you do at that point?

A. Well, we continued to question Mrs. Collins about her free lunches, and started to take a statement regarding the amount and frequency of her eating free lunches in the store.

[91] Q. Had you determined in your own mind that it was a violation?

A. No, sir.

However, I was thinking this.

I decided I had better check to find out if there was a violation. She seemed too emphatic that it was something she was supposed to do, that I went to the phone and telephoned the supervisor, and asked him—the supervisor, Mr. Hal Burnett, and asked him to check out the situation for me, to find out if they were allowed to eat free lunches or if they weren't.

JUDGE NACHMAN: Did she tell you she had been doing this for 10 or 11 years?

THE WITNESS: She said she had been doing it for two years, since she came to that store.

JUDGE NACHMAN: She didn't tell you about the previous employment?

THE WITNESS: No, sir.

I didn't question her regarding her previous employment.

After I had called Mr. Burnett, I was still convinced in my mind that free lunches were wrong. I returned to the table and continued to take the statement, tried to determine the frequency of the free lunches, the amount of free merchandise that she had obtained from Weingartens Store No. 98, and was reducing this to writing when Mr. Burnett [92] called back. He had evidently checked with someone. I don't know who he had checked with. I didn't know at the time.

He said that evidently the employees had been allowed in some stores to have free lunches, and because of what he told me, I returned to the table and destroyed the statement that I was preparing.

Q. (By Mr. Martin) Were you writing the statement?

A. No, sir, I was writing it.

Q. Was the statement taken out of the typewriter at anytime before Mr. Burnett returned his called?

A. No, sir, it was—right after I returned to the table, after Mr. Burnett had informed me that in some stores some of the employees had been allowed to have free lunches—

JUDGE NACHMAN: Did he say whether that was the case at No. 98?

THE WITNESS: No, sir, he had not checked that to any extent.

Q. (By Mr. Martin) Did you ask Mrs. Collins to sign the statement at anytime during the interview?

A. No, sir, I never asked Mrs. Collins to sign that statement. The statement was still in the typewriter until Mr. Burnett called me back on the telephone.

Q. And after Mr. Burnett called you, what did you do with the statement?

A. I removed it from the typewriter. I think I put it [93] in my briefcase. I know I didn't leave it in the store. I put my typewriter back in my typewriter case, thanked Mrs. Collins for her time, and listened while Mr. York asked her if she wanted to take the rest of the day off. She was quite, presumably, emotionally upset. She had tears in her eyes.

Q. What did she say in reply to Mr. York's question?

A. She said she wanted to take the rest of the day off.

Q. Was there any discussion, to your knowledge, about pay for the day, the remainder of the day?

A. Not to my knowledge, no, sir.

Q. Was there any discussion at that time between Mr. York and Mrs. Collins about keeping the matter confidential?

A. Yes, sir.

Q. What was that?

A. Mr. York, if my memory serves me correctly, told Mrs. Collins that he wasn't going to discuss the matter with anyone in the store. If anyone talked about it—because we were trying to keep the think a private thing—that if anyone talked about it, she would be the one to do the talking.

Q. During the time that you were present with Mrs. Collins and Mr. York, did Mrs. Collins ever demand that—ever demand union representation?

A. No, sir.

[94] JUDGE NACHMAN: Well, what did she say about union representation, to your best recollection? Quoting her exact words as near as you can?

THE WITNESS: She said, "Shouldn't the union be in on this" at the onset of the interview when I started asking her about the difference between the price of the chicken that I thought she had taken, and the price she had actually paid.

JUDGE NACHMAN: Those were her exact words, "Shouldn't the union be in on this?"

THE WITNESS: I believe so, yes.

Q. (By Mr. Martin) Did you make any reply to that statement?

A. No, sir, I didn't.

Q. Did Mr. York make any reply?

A. Yes.

Q. What did he say?

A. He told her that it was a private matter between the company and her and that he didn't think that there was any need for the union to be present.

Q. Do you recall if he said, "No, you cannot have union representation."

A. No, he didn't say no. He didn't refuse. He didn't say, "No, you can't have the union up here."

Q. How many times was the union mentioned, do you recall, during the interview?

[95] A. Well, that I heard?

Q. Yes, sir.

A. I heard her ask for the union one time at the onset of the interview.

Q. How long did this interview last?

A. I think from 20 to 30 minutes.

Q. When did it commence, do you know?

A. Well, it was after—I didn't consult a clock or anything, but it was after—immediately after their lunch hour rush was over with, because store employees were still in this break area where the interview took place during the lunch hour, and we had to wait for them to leave before we could have a private area to conduct the interview.

JUDGE NACHMAN: That lunch rush is over probably at what time?

THE WITNESS: I think about 1:00 o'clock, sir.

JUDGE NACHMAN: So, the interview was shortly after 1:00 o'clock?

THE WITNESS: Shortly after 1:00 o'clock.

Q. (By Mr. Martin) Were you present at anytime when a statement or comment was made by anyone, by Mr. York or Mrs. Collins about anyone going to the restroom or to the bathroom?

A. No. I don't remember any statement—

Q. Did you inform Mrs. Collins at anytime during the [96] interview that as a result of the interview, that some disciplinary action might be taken?

A. No, I didn't inform her that I wouldn't, because I don't know if any disciplinary action can or will be taken as a result of any interview.

Q. At the conclusion of this interview, or any interview that you particpate in, is it your function to make a recommendation as to discipline that should be meted out?

A. No, sir.

JUDGE NACHMAN: You just gather the facts and report them to your superior?

THE WITNESS: Yes, sir.

MR. MARTIN: Pass the witness.

CROSS EXAMINATION

Q. (By Mr. Helms) Who is Hal Burnett, and what position does he hold?

A. The assistant director of the Loss Prevention Department.

Q. When you make a report, that report goes to Monroe Rochester, doesn't it?

A. No, sir.

JUDGE NACHMAN: Who is Monroe Rochester, or do you know?

THE WITNESS: He's a vice president—

JUDGE NACHMAN: I'm asking Counsel.

MR. HELMS: Vice President of Personnel.

JUDGE NACHMAN: Well, if that's important, let's have [97] it in the record and let the witness testify to it.

Is that who he is? Is that who Mr. Rochester is?

THE WITNESS: Yes, sir.

Q. (By Mr. Helms) Do you write a report which would go to a vice president?

A. Yes, sir.

Q. What vice president is that?

A. Joseph Patterson.

Q. OK.

Now, I believe you gave a figure of about $160 that she owed for lunches, right?

A. I didn't come up with that figure—I don't remember what figure. I did come up with—

Q. You came up with a figure, though.

A. Yes.

Q. A fairly substantial figure?

A. Fairly substantial, but I don't remember what figure.

Q. You and Mr. York calculated over a period of time as to how much the lunches were and as to how long they had gone on, and so forth? Right?

A. I asked Mrs. Collins—I don't remember Mr. York entering into the calculations. I asked Mrs. Collins how long these lunches, what frequency, what amount of the merchandise she had consumed and how often this had taken place, yes, sir.

Q. Now, what else did you talk to her about besides the— [98] about the chicken in the box and the free lunches.

A. Broad topics. That's all I talked to her about.

Q. You didn't say anything to her about stealing?

A. Yes, sir.

Q. What did you say to her about that?

A. I asked her if she had ever taken anything from the Weingarten Company, any money or merchandise that wasn't hers, and she denied it.

Q. Did you talk to her about ringing up the cash register?

A. Yes, sir.

JUDGE NACHMAN: You mean, ringing up short on the cash register?

MR. HELMS: Yes, sir.

MR. MARTIN: Is that the question now phrased, or was the previous question—

JUDGE NACHMAN: The question as asked was in the light of my—what I suggested. I thought Counsel meant, and he confirmed that is what he meant.

MR. MARTIN: Well, I didn't understand if the witness understood that.

Q. (By Mr. Helms) Did you accuse her of taking a dollar bill and some change and ringing up the change and pocketing the dollar?

A. No, sir, I didn't accuse no one.

Q. What did you ask her about on ringing the cash register?

[99] A. I asked her if she had ever taken any money from the cash register, or ever taken—with the situation that you just described, where say a dollar and fifteen or twenty cents was paid for an item, if she had ever taken and rang the dollar and kept the fifteen cents for herself.

But I never accused her of taking this money for herself.

Q. Did she show you her foot, or a foot that day? Did she stick out her shoe?

A. No, sir.

Q. You don't recall that?

A. No, sir.

Q. Do you know whether she did, or you just don't recall it?

A. No, sir, she didn't.

Q. You did tell her you were going to have her sign the statement, didn't you?

A. Sir?

Q. I said, you did tell her that you were going to want her to sign the statement?

A. No, I believe—

Q. Well, what did you tell her about the statement that you were writing up?

A. I believe she asked Mr. York if the statement—she said, I believe, if I remember right, she said—asked Mr. York, "What's he doing?" And, asked me what I was taking, and I said I was taking a statement. And

she asked Mr. York, "Am [100] I going to have to sign it?"

Q. What did Mr. York say?

A. I think he said, "I don't know if you're going to have to sign it or not."

Q. You generally have a practice of preparing a statement and having a person like that sign it, don't you?

MR. MARTIN: I object to the characterization of the person, "like that." It's not defined as to—

JUDGE NACHMAN: Well, he means the person who he is interviewing.

MR. HELMS: Yes, sir.

THE WITNESS: Yes, sir.

Q. (By Mr. Helms) That's standard procedure?

A. Yes, sir.

JUDGE NACHMAN: Well, that's the purpose of writing it up, is to get the person to sign it.

THE WITNESS: That's correct.

Q. (By Mr. Helms) York was present at all times when you talked to Collins?

A. That's correct.

Q. Now, you interviewed Moody at York's desk, is that right?

A. That's correct.

Q. But you took Collins back into the lounge area?

A. Some 15 feet from York's desk.

Q. Did other employees come in there while you were [101] conducting the interview?

A. No, sir.

Q. According to your testimony, the only thing that was said about union representation by this girl was, "Shouldn't the union be here?"

A. That's the only thing that she said regarding it whenever I was there.

Q. But you weren't there all the time?

A. That's true, too.

Q. She did get pretty emotional, didn't she? She cried?

A. Whenever I returned from the downstairs area and informed her that I had checked into the situation regarding the chicken boxes, well, she became emotional.

She had tears in her eyes. She wasn't a loud, wailing, screaming, crying—but there were tears in her eyes.

Q. Do you, in an interview or in an investigation like this, do you check on the employees as to what kind of financial condition they might be in or anything like that?

A. You mean a credit check?

Q. No, not a credit check. Do you review her personnel record, or—to see what kind of shape she might be in?

A. Other than talking to the employee about it, you mean?

Q. That's right.

A. No, sir, generally not.

Q. You don't know—when you were talking to her, you didn't [102] have any idea as to what her financial responsibilities were at all?

A. No, sir, I knew from talking to Mr. York that she may have been ill prior to the discussion.

Q. Before you talked to her, did you know that she had been a fairly longterm employee?

A. Yes, sir.

MR. HELMS: That's all.

JUDGE NACHMAN: Any redirect?

MR. MARTIN: Yes.

REDIRECT EXAMINATION

Q. (By Mr. Martin) Do you have instructions or a practice concerning taking statements from those individuals who occupy a position other than accused or suspected persons?

A. Yes, I do.

Q. And what is that policy or practice?

A. Well, I take a statement from many people that I talk to if I think that sometime at a later date, I might need to know what was said on this particular date.

JUDGE NACHMAN: Well, is it correct that you might interview people who at some later date might be

witnesses to somtehing, and you want to have a statement from that prospective witness?

THE WITNESS: Yes.

JUDGE NACHMAN: The person you interview is not [103] necessarily accused or suspected of doing something wrong?

THE WITNESS: No, I interview many people that are not necessarily—

Q. (By Mr. Martin) So, the significance of the statement does not necessarily indicate that you suspect a person of being guilty of any particular misconduct?

A. That's correct.

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JOE M. YORK

was called as a witness by and on behalf of the Respondent,

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DIRECT EXAMINATION

Q. (By Mr. Martin) Would you state your name for the court reporter, please?

A. Joe M. York.

Q. And your address?

A. 11737 East Tex Freeway.

Q. By whom are you employed, Mr. York?

[104] A. J. Weingarten.

Q. In what capacity?

A. As a store manager.

Q. How long have you been employed by Weingartens?

A. Six years.

Q. Have you always occupied the position as store manager?

A. Yes, sir.

Q. What store are you presently the store manager of?

A. Store manager at Store No. 98.

Q. How long have you been the store manager of that store?

A. Since opening, which is approximately two years.
Q. Do you know Mrs. Collins?
A. Yes.
Q. As an employee under your supervision?
A. As an employee.
Q. In connection with your duties, do you have any authority over those employees in the store as far as discipline is concerned?
A. Yes.
Q. What would that be?
Would you describe to the Judge your duties in that regard?
A. Well, I'm primarily responsible for the operation of the store. The people are responsible to me. I have department managers under me who in turn have employees [105] under them, is what I'm saying.
As far as everyone in the store, they're responsible either directly or indirectly to me.
Q. Do you have any authority over the discipline to be given to an employee under appropriate circumstances?
A. I do have the right to hire and fire people, with one exception; that being in cases of extreme theft or loss. It is the company policy that I, as a store manager, discuss this with my group, or district manager.
JUDGE NACHMAN: Before you take any action?
THE WITNESS: Before I take any action.
JUDGE NACHMAN: You still take the action, but—
THE WITNESS: Not necessarily.
I have the right to recommend in cases of theft—or I have to bring it to his attention, and he has to make the final decision as far as—if there's a case of dismissal.
Q. (By Mr. Martin) Were you in the store on June 15th of 1972?
A. Yes.
Q. Did you have occasion to talk with any of the employees about—strike that.
Did you have occasion to talk with Mrs. Moody about any of the activities of her fellow employees?
A. Yes.
That morning, Mrs. Nellie Garcia, one of my courtesy [106] booth operators, while I was in the courtesy booth,

told me, "Mr. York, Jewell was very upset in the lobby about something."

JUDGE NACHMAN: Jewell—

THE WITNESS: Jewell Moody, in the lobby department.

And she did not know whether to come talk to me or not to come talk to me. I asked her why, and she related to me that she had observed Leura Collins on Wednesday taking some chicken.

After closing the closing the conversation with Miss Garcia, I went over and talked to Jewell and asked her what she was, you know, getting at; or what the deal was about the chicken.

She told me that Mrs. Collins had been in about the time—or a few minutes before the store opened on Wednesday morning, and had got a big box of chicken and paid a dollar for it. And we closed our conversation.

A short while latter, Mr. Don Hardy came in, introduced himself. I had never met Don before. We have several security people in our company that we know, or don't know.

He introduced himself, showed me his credentials, and told me that he had been in my store Tuesday and observed my lobby department operation and again on Wednesday, and he had found no acts of dishonesty on Tuesday and Wednesday.

So, Mr. Hardy and myself decided to have lunch. We had lunch, and we talked about—this was when we talked about [107] my discovering any acts of dishonesty.

I brought up to him my—what I had found out that morning, or had been told that morning about the chicken.

After finishing lunch, we went upstairs and discussed it a few minutes, and then he asked me to ask Mrs. Jewell Moody to come upstairs.

I went back downstairs and asked Jewell to come upstairs. We came upstairs. We were in my office area, which is against one corner and faces out into the center of the store.

I told her that Mr. Hardy was with our security department and I would like for her to relate to him what

she had related to me about Mrs. Collins taking the chicken.

She was very reluctant but she went ahead and told him that Mrs. Collins had gotten a big box of chicken and paid a dollar for it.

So, Mr. Hardy asked her a couple of questions about the size of the box. It was determined it was the large size, which we call in our company a family-sized box; and we tried to determine the value of approximately $3.

Mrs. Moody returned downstairs, and Mr. Hardy asked me if we could talk to Mrs. Collins.

I went down and asked Mrs. Collins to come upstairs. We had raised a table—arranged a table in sort of the center of the room, away from the front part of my office and my desk, where it sits, where it could be private, [108] because no one likes to sit out in the open and talk to anybody.

Mrs. Collins came upstairs with me. I introduced Mrs. Collins to Mr. Hardy as the Weingarten security department. We all sat down.

I told her that Mr. Hardy would like to talk to her about a few things. Mr. Hardy began to ask her questions about the chicken box incident. Had she come in and made a purchase of some chicken, how much chicken, the size of the box.

Unknown to Mr. Hardy and me, we neither one knew about the—us being, as a store, out of the box size, the small size against the large size. This came up, you know, the value of a $3—if you had a big box, the value is roughly $3. How did you pay a dollar?

This was when we discovered about—she said she only —you know, three or four pieces of chicken.

Mr. Hardy excused himself for a moment and went downstairs and discovered about the—us not having any smaller boxes, and came back and told me and Mrs. Collins at the same time that the chicken incident had been cleared up; and we were sorry, but that it had been cleared up.

Q. (By Mr. Martin) Mrs. Collins—at anytime before this, had she ever mentioned anything about the union?

A. She had mentioned—let me see exactly when, now. [109] Just before, I think, Mr. Hardy went downstairs, we were beginning—Mr. Hardy was asking questions; and Mrs. Collins looked over to me and said, "Shouldn't the union be present?"

And my reply was, "Leura, I think it's kind of a private matter between us and the company, and yourself, and us, and I really think it should be kept that way. I really don't see the need for it, because we're just trying, you know, asking questions and maybe clear up a matter."

Q. What did she say in reply to that?

A. She accepted it. She didn't say, "No, Mr. York, I want the union," or anything like this. She accepted my answer.

Q. Then, what happened after your conversation with her about the union? Did Mr. York have any additional questions for her?

A. Mr. Hardy?

Q. Mr. Hardy.

A. I think this about when he went downstairs and verified the size of the box, and came back and told me and Mrs. Collins at the same time that we had not had the right size box, and that the matter had ben cleared up.

Q. What was said at this time, if anything, about free lunches?

A. Well, after Mr. Hardy said the matter about the size [110] of the boxes had been cleared up, Mrs. Collins, said, "Thank God," her prayers had been answered, and so forth, and that she had never taken anything from Weingartens except the free lunches. I looked up because free lunches is something that I wasn't aware of.

Mr. Hardy looks over at me and says, "What is free lunches?"

Q. To your knowledge, Mr. York, had any employees in the lobby department of Sore No. 98 ever received a free lunch while you were the store manager?

A. Not to my knowledge.

Q. Would you continue, then, with what was said about—by the parties at the interview.

A. OK.

Let's see.

Mr. Hardy began to ask Mrs. Collins questions about the free lunches, you know, if she—how many times that she—did she eat a week? Did she eat today and maybe not eat tomorrow, and maybe—this type of thing, and Mrs. Collins said, "Well, she might eat a piece of chicken today, or might eat a vegetable tomorrow. Some days she might not eat, or just—maybe just have a drink one day.

During this, Mr. Hardy went on and asked her a few questions, and in a few moments, he left the table where we were sitting and went to my desk which is approximately [111] eight or ten feet away, with a telephone, and made a phone call.

JUDGE NACHMAN: Did you know to whom he was talking?

THE WITNESS: At the time, I did not know who he was calling.

JUDGE NACHMAN: And you didn't hear what was said?

THE WITNESS: No.

JUDGE NACHMAN: All right.

THE WITNESS: He returned from using the telephone and sat back down and began to ask a few questions, and just about here, Mrs. Collins said, "Couldn't I have Billie Brockett present?"

I said, "Well, Leura, you know, it's still basically a private conversation between us, and we're just trying to clear up some matters."

So, she had a few tears in her eyes. She wasn't hysterical or what you would call an emotional person about it. She had some tears and this type thing, but not hysterical.

Mr. Hardy began to ask her about the number of times per week, and he was trying to figure out, maybe, if she ate two or three times a week any try to maybe come up with a dollar value, which I still don't know what pin-

point dollar value was ever put on it, because I, you know, didn't get that involved in it.

[112] Mr. Hardy was typing up a statement concerning, you know, the dollar value and what had transpired, to turn in the report.

Somewhere during the type of this, he received a phone call or was paged over the PA system. He excused himself and answered the phone, and came back and he said that Mr. Burnett, or whoever he had talked to—I don't remember who he said he talked to, now—had said that in some stores the people had received free lunches and in some stores, they had not. It was kind of a matter of discussion, and said we would terminate the interview.

So, Don said that he didn't have anymore questions or anything, and I asked—we all sat there for a moment. I finally got up and I asked Mrs. Collins if she would like to be off the rest of the day, because she, you know, was still tearful and emotional, and I thought to myself, well, maybe she would like to be off or wouldn't like to be embarrassed. I wouldn't like to do anything to embarrass anybody.

I asked her if she would like to be off. She said yes, so we all went downstairs and Mrs. Collins left and went home.

Q. Did you know that there was a company policy regarding free lunches in the lobby department?

A. No.

[113] Q. Before the day of the interview?

A. To my knowledge, that has never been a company policy.

Q. Well, I'm asking you, do you know if a policy existed one way or the other about lunches in the lobby department?

A. Rephrase that—

Q. To your knowledge, was there a policy at the company regarding free lunches, or paid lunches, as the case might be, for employees in the lobby department?

A. They did not receive the lunches. There is a policy that says they do not.

Q. There is a policy, they do not.

A. They do not.

Q. Does your store have a lunch counter operation of any description?

A. My department is set up as a lobby department and not a lunch counter.

Q. On the day that your store was opened, were you present?

A. The day of the opening?

Q. Yes.

A. Yes.

Q. Do you know whether or not there were any employee orientation sessions conducted before the store opened?

A. Yes, sir.

Q. Were you present when these occurred?

A. I wasn't present in the presentation.

[114] Q. Do you know if there is a policy regarding what is said to these employees of the lobby department about lunches?

A. Yes.

Q. What is that policy?

A. There is a company policy that, the day before, or two days before, each department holds a presentation. You cover the rules, regulations, and everything. It's a company policy that you cover rules, regulations, and policies concerning every department, and a meeting is held for every department.

Q. You do not know, then, from your personal knowledge whether a statement was made to these employees about lunches or not?

A. No.

Q. During the course of this interview with Mrs. Collins, was there any comment made about going to the restroom or to the bathroom?

A. Not to my recollection.

Q. Did you tell Mrs. Collins that if anybody goes to the bathroom, "all three of us go?"

A. No.

Q. Mr. York, if it had been determined in your mind that Mrs. Collins had done something that constituted

misconduct, would you have had authority to discipline her as a result of that interview?

[115] A. If it's—if you're talking about misconduct.

Q. I'm talking about theft.

A. We're talking about theft.

I would have to have consultation with my district manager concerning theft.

Q. Would you make the final decision on that?

A. He would.

Q. Did anytime in the interview, you inform Mrs. Collins that as a result of what she said, that her job might be in jeopardy?

A. No.

Q. Or that her job was on the line or anything of this nature?

A. No.

Q. What was your purpose of being in the interview? Did you ask questions?

A. I don't think, to my recollection, that I asked any questions about the chicken or the lunches. I think probably the only question that I might have asked is, you know, "is everybody eating lunch on me," or something like that, indirectly.

Q. Did you have any other purposes—what was your purpose in being in the meeting between Mr. Hardy and Mrs. Collins?

MR. HELMS: Objection.

JUDGE NACHMAN: You may answer that.

[116] Q. (By Mr. Martin) The question is, what was your purpose in being there while Mr. Hardy was interviewing Mrs. Collins?

A. Well, as the store manager, I felt that it was my store, and as a management right, I felt I should be there, or have that right as manager, to rephrase that.

Q. Following the interview that you had with Mrs. Collins, did you discuss with any other employee of the lobby department the topic of free lunches?

A. I talked to Edna Odoms, the department manager, about free lunches.

Q. What did she say?

A. We had a discussion about whether they were or were not receiving free lunches?

Q. What did she say?

A. She said they were.

Q. What did you tell her?

A. I immediately told her, as the store manager, that there would be no free lunches, that it was a company violation, that no one receives free lunches, or are to receive any merchandise that is not paid for.

Q. Did she indicate to you that she had any knowledge of this policy before you informed her?

A. Repeat that.

Q. Did she say anything at all about her prior knowledge, her knowledge of either company policy, either for or against [117] having lunches at this time in the lobby department?

A. No.

Q. How was the—

JUDGE NACHMAN: She thought it was perfectly proper for these employees to get free lunches?

THE WITNESS: She did not know, really, one way or the other.

JUDGE NACHMAN: But she knew that it was going on and did nothing to stop it?

THE WITNESS: Right.

Q. (By Mr. Martin) Did you ask her if she, herself, was partaking of free lunches?

A. She was.

Q. Did you ask her?

A. I asked her.

Q. And what was her reply?

A. That she was.

Q. Was any—

JUDGE NACHMAN: I assume that she told you that she thought she was entitled to them.

THE WITNESS: No, sir, she did not say that she thought she was entitled to them.

JUDGE NACHMAN: Well, I mean entitled to them under company policy.

Was she telling you that she was doing something—[118] knowingly doing something wrong?

THE WITNESS: No, I don't think that she was telling me that she was—that she felt it was wrong. She was just doing it.

JUDGE NACHMAN: Because she thought it was the practice in the store?

THE WITNESS: Right.

Q. (By Mr. Martin) To your knowledge, has there been any disciplinary action taken against any employee in the lobby department for taking the lunches before you found out?

A. There has been no action taken on anyone.

JUDGE NACHMAN: But you immediately stopped the practice?

THE WITNESS: I stopped the practice then, because—

Q. (By Mr. Martin) Why did you stop the practice?

A. Because it's not a company policy that you receive free lunches.

MR. MARTIN: Pass the witness.

JUDGE NACHMAN: The company takes a pretty dim view of employees they find are engaging in thefts and other acts of dishonesty, don't they?

THE WITNESS: As a store manager, I don't think they do.

JUDGE NACHMAN: You don't think they do?

THE WITNESS: No, sir.

[119] JUDGE NACHMAN: Go ahead.

CROSS EXAMINATION

Q. (By Mr. Helms) Are you acquainted with the contract between Weingarten and the Retail Clerks?

A. Yes. To a degree.

Q. Have you ever read Article 4 on discharge discrimination, especially Paragraph B about the warning notice that has to be given to the employees before discharge?

A. To give you an honest answer, it has been quite sometime since I have sat down, and you know, read through it.

I do know that you—for dismissal, it is a policy that we have to write up an employee on the grievance form at least once before they can be dismissed.

Q. However, you don't have to write them up for certain things, do you?

A. No, sir.

Q. But, anyway, you follow the policy of the contract, whatever it is?

A. Yes, sir.

Q. Just about the time of the interview, now, you testified, Mr. York, that twice during the interview, Leura Collins at least had something to say about a union representative being there, and at one time, I believe you testified that she asked if she couldn't have Billie Brockett.

Billie Brockett is an employee in your store?

[120] A. Yes, sir.

Q. And I'm sure you know that Billie Brockett is the union steward there?

A. Yes.

Q. Isn't it true that Mrs. Collins, just before the end of the interview, asked again for Billie Brockett to be present?

A. She asked for Billie Brockett's presence one time, sir.

Q. She requested representation just about the end of the interview, too, didn't she?

A. No, sir, the only time she asked for—she asked for Billie Brockett to be present, couldn't Billie Brockett be present.

Now, I wouldn't consider it towards the end.

Q. How many times did she ask for representation during this interview?

A. She didn't ask for representation.

Q. All right.

We'll put it, exactly what she said.

You testified that once she said, "Shouldn't the union be here."

A. Right.

Q. Then, another time, she asked if she couldn't have Billie Brockett there?

A. Yes.

[121] Q. Did she ask any other time about Billie Brockett, or the union being present?

A. No, sir.

Q. Just twice?

A. Twice.

Q. I believe you made a statement, not in this hearing, that Hardy, Don Hardy told Collins that he wished the interview kept confidential.

A. I didn't understand—

Q. I say, you have made the statement outside this hearing room that Don Hardy said at the interview that Don Hardy told Collins at the interview that he wished the interview to be kept confidential.

A. I still don't understand.

Q. Well, haven't you made that statement?

A. No, sir.

Q. And it's your testimony that Mrs. Collins asked to go home that day, right, after the interview?

JUDGE NACHMAN: I don't think the witness so testified.

THE WITNESS: No, sir.

I asked Mrs. Collins, myself. I asked Leura, you know, would you like to go on home, be off this afternoon, go on home.

MR. HELMS: All right.

THE WITNESS: She replied yes.

[122] MR. HELMS: Would you indulge me, please, sir, just a minute.

Q. (By Mr. Helms) All right.

You didn't tell her to take the rest of the day off?

A. No, sir, I asked her if she would like to be off.

JUDGE NACHMAN: After she indicated she would want to, you told her she could do it?

THE WITNESS: Yes, sir.

Q. (By Mr. Helms) All right.

Do you know about how many hours were left in that day on that day?

A. Approximately four.

Q. I show you this memorandum and ask you if you've ever seen a copy of it?

A. I've never seen a copy of anything like this.
Q. All right.
Do you know what this memorandum concerns?
A. The four hours.
Q. Do you know that Leura Collins was paid for those four hours on June the 15th, that she—after the interview, whether she at least left the store and went home or wherever she went?
A. I have been told that she has been paid.
Q. By whom have you been told?
A. Mr. Perry, because they handled it through the [123] personnel department.
Q. Well, you knew that there was a grievance filed about that?
A. Yes.
Q. And the company did pay the four hours?
A. Yes, sir.

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[125]

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JOE PERRY

[126] was called as a witness by and on behalf of the Respondent,

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DIRECT EXAMINATION

Q. (By Mr. Martin) Mr. Perry, would you state your name and address for the record, please?
A. Joe Perry, 1102 Telephone Road.
Q. And by whom are you employed?
A. Weingartens.
Q. In what capacity?
A. Assistant Director of Industrial Relations.
Q. Have you always been in that capacity with the company?
A. Yes, sir.
Q. How long has that been?

A. A little over eight years.

Q. Would you describe briefly for the Judge what your duties are in connection with personnel?

A. Yes, sir.

I work under the supervision of the Vice President of Personnel, and Industrial Relations; and act as his assistant to all matters pertaining to labor relations, recruiting, training, developing of personnel, wage and hour, salary, wage administration. That sort of thing.

Q. Are you involved in employee grievances?

A. Yes, sir, I am.

[127] Q. What is you connection with employee grievances? What authority or jurisdiction do you have?

A. Well, generally, I act as a middle man pretty much between—after a grievance is progressed through the steps of going through the store manager and the group manager, I would normally, at that point, if it has not been settled satisfactorily, then at that point I would get into discussion with the union; and generally, Mr. Phillips, James Phillips.

Q. Do you see these grievances? Ever see them physically?

A. Yes, I see all grievances that are filed and ultimately come across my desk.

Q. How many stores are under your bailwick?

A. All stores, 100.

Q. One hundred?

A. One hundred.

Q. Do you know if there was a policy regarding free lunches for lobby department employees?

A. There is no policy of free lunches for any lobby department employees.

Q. Would you tell us briefly the difference between a lunch department and a lobby department?

A. Well, without being able to actually show you, I guess the best description would be that the lobby department is a considerably more sophisticated type of sales arrangement, [128] in that in the old lunch type of application, it was a kind of a fry station where they normally had a steam table. Normally, the configuration of the equipment was such that they may have a

slicer, a hotplate, or a grill where they normally made hamburgers and whatnot.

Generally, it was a type of a quick-fry thing, generally for consumption there at the counter; predominantly for consumption right there on the premises at stools or small tables.

Over a period of years, the application has evolved to where we have gone now to a new type of operation, which is the lobby operation.

It differs probably most from the lunch operation in that most of the food is prepared, first of all, in greater quantities; prepared for take-home more than consumption, I think, on the premises; but geared to specialty type items such as whole barbecued chickens, different types of kosher foods; salamis, cheeses, fishes, pickles, certain types of breads, imported New York cheeses, this type of thing; and additionally, the lobby departments have a lot of sophisticated types of equipment attached to them.

The thermal ovens which can cook merchandise in a matter of moments, where in a conventional oven, it would take, say, an hour. Different types of slicing, weighing equipment, and in some of the larger ones, bakery operations, [129] where the bread is actually baked in the ovens there, and are prepared, made up, baked there in the ovens and displayed and sold directly from the lobby operation.

Q. Is there any difference between the level of skill required for employees that work in the lunch counter as against the lobby department?

A. Yes, considerably greater skill is required in the lobby by virtue of the fact that—for example, the preparation of 15 or 20 pounds of salads.

* * * *

[131] Q. In those stores where a lunch counter continues to exist, what is the policy there regarding lunches?

A. That the employees do receive a meal a day. That policy, of course, has evolved over the last—well, you know, ever since I've been with the company, and I under-

stand it's been in existence even back prior to the time I came with the company.

Q. Does the company have a procedure or format they follow orientating their employees when they open up a new store?

A. Yes.

Q. What is that?

A. Well, generally—of course, when we open a new store, we open it with a team of people. Most of the individuals that open the store don't ultimately stay with that store. I'm talking about the management, the supervisory people, and they'll generally come in several days before the store opens, train all the people as to the specific duties that they're going to be performing. We will orientate them in terms of what the policies will and will not be.

Each store, of course, has a little different configuration, the parking is different, and you have to go to some [132] length to explain to employees where to put their parcels, purses, where to park, where and where not to be in certain areas of the store, because they're new.

We have wine sections in some, and some we don't have wine. In some, we sell beer, and in some we don't sell beer. Some we sell liquor, some we don't.

So, we generally have meetings with the respective department, and the supervisor of the department conducts the meeting and explains to the employee generally what would be expected of him.

Of course, at that time, in addition to just the general policy, we have managers for all the departments, training managers, that spell out precisely what the policies are for that particular department at the time we open because of the confusion of so many people on a grand opening.

Generally, our policy is to go into some depth about the policy because most of the people in the clerk positions are new. We hire generally at the location where we open the store. We may transfer people, but it's only in the key positions.

Q. Do you know whether or not it is part of the orientation of employees in the lobby department to advise

them that no, there are no free meals when the store opens?

A. Yes, it is.

[133] Q. Do you know whether or not from your personal knowledge that such an instruction was given when Store No. 98 opened?

A. To my best understanding—

JUDGE NACHMAN: That wasn't the question.

Do you know of your personal knowledge?

THE WITNESS: If I was there?

No, sir, I was not there.

JUDGE NACHMAN: You really don't know. You only know what somebody else told you?

THE WITNESS: Right. I know they were supposed to.

Q. (By Mr. Martin) Do you know who the person was that was responsible for this type of orientation for the lobby department?

A. I'm sorry. Would you repeat that?

Q. Do you know who it was that supposed to give the instruction to the lobby department employees about their responsibilities, the lobby—

A. At store 98, sir?

Q. Yes.

A. Yes, Mr. Spector, Mickey Spector.

Q. Is Mr. Spector still with the company?

A. No, sir, he's not.

Q. So, you have not had an occasion to talk to him about store 98's opening?

A. No, sir.

[134] MR. MARTIN: I'll ask the reporter to mark for identification Respondent's Exhibit 2, (a) and (b), consisting of two pages, for identification.

(The documents above-referred to were marked Respondent's Exhibit Nos. 2(a) and 2(b) for identification.)

Q. (By Mr. Martin) Mr. Perry, I'll place in front of you Respondent's Exhibits 2(a) and (b).

Can you identify that, please?

A. Yes, sir.

This is a segment of the training manual of the lobby department.

Q. Is there—what portion if any of this exhibit (a) and (b) refers to the lunch aspect of the lobby department?

A. It would be Paragraph 1 and 2, located—Paragraph No. 1 located and beginning at the bottom of Page 3, and Paragraph No. 2 at the top of Page 4.

MR. HELMS: I didn't quite understand, Neil—

JUDGE NACHMAN: What portion of this exhibit, R-2(a) and (b) for identification, deals with the question of lunches?

His answer is Paragraph at the bottom of Page 1, and Paragraph 2 at the top of Page 2.

Q. (By Mr. Martin) Is there any particular sentence that prohibits free lunches for lobby department employees, and if so, would you indicate where that is on Respondents (a) and (b)?

[135] JUDGE NACHMAN: I will assure you that I can read it.

MR. MARTIN: OK.

I move that Respondent's 2(a) and (b) be placed into evidence.

JUDGE NACHMAN: Any objection?

MR. HELMS: No, sir.

JUDGE NACHMAN: Respondent's 2(a) and (b) will be received.

(The documents heretofore marked Respondent's Exhibit Nos. 2(a) and 2(b) were received in evidence.)

Q. (By Mr. Martin) To your knowledge, Mr. Perry, have there been any other instances brought to your attention where employees of a lobby department are receiving free lunches besides—

JUDGE NACHMAN: You mean, in any other store?

MR. MARTIN: Besides Store No. 98.

THE WITNESS: No, sir.

Q. (By Mr. Martin) Is there a policy of the company regarding discipline to be given to employees determined to be guilty of theft or dishonesty?

A. Well, I'm not sure how to answer the question.

Yes, there is a policy.

Q. Well, what is that policy? Describe as you can as to—

A. Well, I would say that—of course, that would depend upon the circumstances. Normally, in my opinion, if an [136] employee was guilty of theft, gross theft, we would probably look into the matter and terminate the employee. We would not want an employee working for us that was stealing from us. I think it would depend upon the circumstances. Stealing is stealing an apple.

JUDGE NACHMAN: Really, you don't mean probably. If you determined it to be a fact that an employee had stolen by ringing up 15 cents on the register when the sale was a dollar and fifteen cents, you would fire him, wouldn't you?

THE WITNESS: Well, I probably would consider that, yes, sir.

However, I known instances where there have been employees who have been with the company for a long, long time that we have not taken that severe an action to terminate them.

Q. (By Mr. Martin) What kind of a situation would not result in termination if you determined that an employee was guilty of theft?

A. Well, I think most of these situations go to the—a man for example who stole a bottle of catsup out of the warehouse, or walked out of the store with a can of peas in his pocket that has 15 or 16 years service. We have not fired this individual even though he admitted he did take a can peas or a bottle of catsup or whatever it was, because that's [137] been Weingartens philosophy, and Weingarten people have historically taken a very liberal philosophy about that sort of thing, where length of service was involved.

Q. Have you ever informed Mr. Phillips of the Retail Clerks Union of this philosophy or this policy?

A. Well, he would know of it because Mr. Phillips and I speak regularly concerning matters that involve violations of all types of policies of Weingartens as well as violations of the union contract.

Q. Have you ever had an occasion to talk with Mr. Phillips about employee, or employees, who have been determined to be guilty of theft and those individuals were not terminated?

A. Well, they were guilty as far as the company was concerned, but I think there was some question as far as the union was concerned, and because of the fact that we may not could have substantiated it as strongly as we would have, we've possibly not taken the termination action.

Q. Have you ever informed Mr. Phillips that employees that have been determined by the company to be guilty of theft would be automatically terminated?

A. Depending on the circumstances, certainly. If he knows of somebody that is definitely stealing from us, and the circumstances are such that it involves quite a lot of money, he knows for sure that we would terminate this type of individual.

[138] Q. My question is, is more precise than that.

My question is, have you ever informed Mr. Phillips that employees determined by the company to be guilty of theft as a matter of company policy would automatically terminated?

A. Well, certainly not. He would know better than that.

Q. How would he know?

A. Because we have not terminated people on many occasions where we probably should have, or could have under the circumstances.

Q. Where Mr. Phillips was involved?

A. Certainly.

Q. Were you personally informed of that?

A. Pardon?

Q. Were you personally—where you personally discussed the matter with him is what I'm asking?

A. Yes.

Q. In connection—strike that.

MR. MARTIN: Pass the witness.

JUDGE NACHMAN: Cross examine?

CROSS EXAMINATION

Q. (By Mr. Helms) Mr. Perry, what distribution is made of this policy memorialized here in Respondent's Exhibits 2(a) and 2(b).

A. It would be sent to all store managers, supervisors, [139] and to all lobby managers.

JUDGE NACHMAN: Is it available to employees generally?

THE WITNESS: Yes, sir, it's in the lobby department. We have a copy there in the store for the store manager and also a copy for the lobby manager. She uses the manual in connection with training. She has two copies, in fact. One to use in training, the other for her own personal copy.

JUDGE NACHMAN: Well, how about the rank and file employee there, the salesperson? Do they have access to this manual?

THE WITNESS: Yes, sir, they sure do.

JUDGE NACHMAN: It's not restricted to the use of supervisors?

THE WITNESS: Oh, no, it's for the salesperson as a basis for training.

JUDGE NACHMAN: All right.

Q. (By Mr. Helms) All right.

Now, on these discussions that you testified that you had with Mr. Perry about people who the company considered had stolen something where you didn't discharge them, that's where you just didn't have the proof, right? Where you had discussed the situations with Mr. Phillips and you didn't discharge the employee, you just flat didn't have the proof sufficient, you thought, to go ahead and take [140] that action, is that right?

A. You mean my discussion with Mr. Phillips?

Q. Yes, uh-huh.

A. In the company's mind, we thought we had the proof.

Q. Yeah, but when you talked to the union about it, you felt that your proof, the better part was to leave the people alone?

A. If there were doubts, yes.

Q. Yes, sir.

JUDGE NACHMAN: Would this be a correct statement, Mr. Perry, that if you had absolute proof that a person was stealing, even though it was only a small quantity of materials, small amount of money, you actually caught them with the money, a marked bill, on that you would discharge without a question?

THE WITNESS: I would recommend it, yes, sir.

JUDGE NACHMAN: But if the circumstances were such that you were convinced in your own mind that the employee was guilty but you didn't feel the proof quite stacked up to enable you to prove it, that's the time that you would not take the discharge action, is that a correct statement?

THE WITNESS: Yes, sir, that is true.

However, there have been instances that I pointed out to you where there has been no question where the employee has admitted the fact that they had taken, and the item was [141] a small insignificant amount of money, but yet the employee had taken the items, had such long service with the company that we have taken no action. That's a philosophy that's—of the Weingarten people.

* * * *

[142] LEURA COLLINS

was recalled as a witness by and on behalf of the National Labor Relations Board,

* * * *

DIRECT EXAMINATION

Q. (By Mr. Helms) Mrs. Collins, directing your attention to the time that you were employed at Store No. 98, at anytime were you shown by any person there what purported to be a copy of company rules or policies and—

[144] THE WITNESS: I said that I had never seen that or anyone had never told me that we wasn't supposed to get our lunch.

Q. (By Mr. Helms) Now, Mrs. Collins, you've been here in the room while Mr. Hardy and Mr. York testified, is that not right?

A. Yes, sir.

Q. And you've heard this testimony?

A. Yes, sir.

Q. Mrs. Collins, I want you to tell the Judge, to the best of your recollection, how many times you mentioned Billie Brockett or a union representative to Mr. York, and what you said to him in connection with mentioning a union representative or Billie Brockett during the interview on June 15th?

A. I asked Mr. York several times if I could have Billie Brockett present, the union stewardess, and he told me no, that's why he was there.

Later on, I asked him, I would say at least three or [145] four times, could I have a union representative or Billie Brockett, and he said about the second or third time I asked him, he said, "Let me put it to you like this. If you go to the bathroom, we all three go."

* * * * *

[147] CROSS EXAMINATION

Q. (By Mr. Martin) Mrs. Collins, you said that Mr. Hardy, after he was off the telephone returned and indicated to you by telling you or Mr. York that she was—that you were entitled to free lunches, is that your testimony, that, "She did do anything wrong, that she should get these free lunches."

A. No, he said that that was—had been the policy.

Q. To get free lunches?

A. That we got our free lunches, yes, sir.

Q. Did he mention anything about this store, 98?

A. No, sir, he just spoke it in those words.

Q. How many times did Mr. Hardy go downstairs, do you recall?

A. Well, as well as I can remember, the one time.

[148] Q. The one time?

A. Yes, sir.

Q. Would you tell the Judge, then, how it's possible that Mr. Hardy could go downstairs to ask about lunches when it was not until he returned from downstairs that the subject of free lunches was mentioned by you?

A. I didn't quite understand what you mean.

Q. Well, isn't it a fact that the first time the lunches came up, and the question, was when Mr. Hardy gave you the statement that it was OK with the chicken, and you said, "Well, that's right, because I've never done anything—taken anything from the company except my free lunches."

A. No, sir, it was when, you know, he was asking me questions about taking things from Weingartens and not paying for it, and I told him myself that I had never taken anything from Weingartens except my lunch and didn't pay for it.

Q. Then, it's your testimony now that he went downstairs afterwards?

A. Really, I'm not going to say, because I really can't remember if it was before or after.

* * * *

GENERAL COUNSEL'S EXHIBIT 2

AGREEMENT

* * * *

ARTICLE 1. *Recognition of the Union and Bargaining Unit*

A. The Employer recognizes the Union as the sole collective bargaining agent with respect to work, rates of pay, hours, and all other terms and conditions of employment for the appropriate bargaining unit herein established and described as follows:

> All employees in the J. Weingarten, Inc., retail stores, excluding all Korner Pantry type stores, located in the Texas Counties of Harris, Brazos, Waller, Fort Bend, Brazoia, Grimes, Montgomery, Liberty, Chambers, Galveston, Hardin, Jefferson, Jasper, Newton, and Orange, excluding store managers, assistant store managers, management trainees, meat department managers, employees working in the meat department, employees in the delicatessen departments in those stores where the delicatessen department is consolidated with the meat department, nonfood department managers, nursery center employees, employees in the stamp redemption centers which are located physically apart from the Employer's retail grocery stores, office clerical employees who work separately and apart from the retail grocery stores, professional employees, guards, watchmen, and supervisors as defined in the Act.

B. The Employer agrees not to enter into any agreement or contract with the employees, written or oral, individually or collectively, which in any way conflicts with the terms and provisions of this Agreement.

* * * *

ARTICLE 4. *Discharge and Discrimination*

A. The Employer shall not discriminate against an employee for upholding Union principles, serving on a

committee of the Union or any organization affiliated therewith.

B. An employee may be discharged for proper cause, and the Employer shall give notice in writing of such discharge to the Union. The Employer shall not discharge any employee without proper cause and shall give at least one (1) written warning notice of the specific complaint or complaints against such employee to the employee and to the Union, except that no warning notice need be given to an employee, before discharge, if the cause of such discharge is dishonesty, drunkenness, falsification of application for employment (discharge for falsification of application of employment must be within sixty (60) days from date of hire), recklessness resulting in a serious accident while on duty, or refusal of any employee to accept a job assignment.

Warning notices shall be void after six (6) months from date of issue.

The Union may thereupon file a written complaint with the Employer within seven (7) days after the Union receives notice of such discharge. Said complaint must be taken up within seven (7) days from the date it is filed with the Employer, by the Union's representative and the Employer's designated representative, and it may be referred to the Board of Arbitration in the event the Union and the Employer's designated representative fail to reach an agreement. Should the Board determine that it was an improper discharge, the Employer shall reinstate the employee in accordance with the finding of the Board of Arbitration.

C. Upon receipt by the Union from the Employer of a warning notice or Corrective Action Record, an employee who feels that such charge was unfair or unwarranted shall have fifteen (15) days from receipt by the Union of such notice, to file a grievance concerning the Employer's action.

ARTICLE 15. *Management Rights*

The management of the business and the direction of the working forces, including the right to plan, direct,

control, expand, reduce and terminate store operations, hire, suspend, or discharge for proper cause, transfer or relieve employees from duty because of lack of work or for other legitimate reasons, the right to study or introduce new or improved production methods or facilities and the right to establish and maintain rules and regulations covering the operation of the stores, a violation of which shall be among the causes for discharge, are vested in the Employer; provided, however, that this right shall be exercised with due regard for the rights of the employee and provided further that it will not be used for the purpose of discrimination against any employee and provided further that this right is not in conflict with any other provision of this Agreement.

* * * *

ARTICLE 18. *Dispute Procedure*

A. The Union shall have the right to designate store stewards for each store.

B. Should any differences, disputes, or complaints arise over the interpretation or application of the contents of this Agreement, there shall be an earnest effort on the part of both parties to settle such promptly through the following steps:

Step 1. By conference between the aggrieved employee and/or store steward, Union business representative, or either, and the manager of the store.

Step 2. By conference between the Union business representative and/or store steward and the District or Zone Manager.

Step 3. By conference between an official of the Union and the President of the Employer or his designate.

Step 4. In the event the last step fails to settle satisfactorily the complaint, it may be referred to arbitration by either party.

C. In the event the parties cannot agree upon the selection of an arbitrator within fifteen (15) days from

date of referral of the controversy to arbitration, the arbitrator shall be selected in the following manner.

The Federal Mediation and Conciliation Service shall be jointly requested by the parties to name a panel of seven (7) arbitrators. The parties shall then choose the arbitrator by alternately striking a name from the list until one (1) name remains as the arbitrator chosen by the parties and empowered to arbitrate the dispute.

The arbitrator shall be authorized to rule and issue a decision and award in writing on any issue presented for arbitration, including the question of the arbitrability of such issue. His decision and award shall be final and binding upon the parties to this Agreement. Where more than one employee is a part of a common grievance, it shall be heard as a single grievance. The fees of the arbitrator shall be borne one-half (½) by the Union and one-half (½) by the Employer party to the arbitration.

The arbitrator shall have no power to add to, subtract from, alter, amend, modify or project beyond its meaning any of the terms and provisions of this Agreement.

The time limit set forth in this Article may be extended upon mutual agreement of the parties.

D. No grievance will be considered or discussed which is presented later than fifteen (15) calendar days after such has happened excepting for any and all claims involving wages, which may be presented within six (6) months. Grievances that have progressed through Step 1 of the dispute procedure must be submitted in writing to be considered in Step 2.

E. The parties agree that grievances may arise of a general nature affecting or tending to affect several employees, and that such grievances may be initiated at any of the above mentioned steps deemed appropriate by the parties.

* * * *

RESPONDENT'S EXHIBIT 1

RETAIL CLERKS UNION, LOCAL 455
AFL-CIO

[LABEL]

For union office use only
Company—J. Weingarten

GRIEVANCE FORM

1. Date form filled out—June 20, 1972.
2. Member's name—General Grievance.
3. Member's Address & Phone No.—.
4. Company—J. Weingarten. Store No. 98. Address—11737 Eastex Freeway, Houston, Texas 77016.
5. Date of Grievance—June 16, 1972. Store Steward—Billie Brockett.
6. Details of grievance giving names, dates, times and all important data—The employees in the Lobby Department of Weingarten #98 have always received their lunches and drinks free, as of Friday, June 16, 1972 this practice was discontinued. This is a reduction in benefits that these employees are entitled to.
7. Settlement Requested—That these employees be given their lunches and drinks as it has always been done in the past.
8. Date grievance was discussed with Mgr. If it has not been discussed so state here—
9. Store Mgr's Name—Mr. Joe York. Supervisor's Name—Mr. John Blair.

10. Member's Date of Employment—Full-Time—X Part-Time—X.

11. Names of witnesses, if any—.

/s/ John D. McCauley
JOHN D. MCCAULEY
Business Representative

Please fill this form out completely and be as neat as possible.

(Must be filled out in triplicate)

RESPONDENT'S EXHIBIT 2(a)

SUBJECT: RESPONSIBILITIES OF LOBBY MANAGER FOR LOBBY DEPARTMENT

The Lobby Manager will be responsible for and have full authority of the Lobby Department. She will have complete control of the operations, including ordering, merchandising, displaying, and variety within the department.

The Lobby Manager will be responsible to the Store Manager and should confer with him on all problems. Whenever a Store Manager is not on duty, it is understood that the Assistant Store Manager will act as Store Manager in all respects.

SUBJECT: COMPANY POLICY—OPERATIONS

The Lobby Manager must operate her department through proper ordering, rotation of product, packaging of the product, cleanliness, merchandise care, and control of spoilage as laid down by the operational procedures of the company. When questions arise she should seek clarification with the Store Manager, of if necessary, the Supervisor in charge of her Lobby operation.

SUBJECT: COMPANY POLICY—GIFTS FROM SUPPLIERS

It is a violation of Company Policy for employees to accept gifts of any kind from a supplier or other companies with which we do business. Employees will not accept Christmas gifts, meals, tickets to entertainment events, recreational trips at the expense of the supplier, or any other gift from a supplier other than merchandising given purely as a sample for the purpose of demonstrating product quality.

SUBJECT: COMPANY POLICY ON SOLICITING, BETTING AND GAMBLING ON COMPANY PREMISES

Lobby Department personnel will not solicit, sell or buy punchboard chances, raffles, or chances of any kind and will refrain from all phases of betting and gambling on company premises. This policy applies to betting on baseball games, football games, etc.

SUBJECT: COMPANY POLICY ON EMPLOYEE PURCHASES, PURSES, CLOTHING AND ITEMS WITHIN THE DEPARTMENT

It is a policy that:

1. No purchases of any type will be made within the store while on company time.

RESPONDENT'S EXHIBIT 2(b)

2. Any minor purchases such as milk, cookies, etc. for lunch periods must be purchased after the Lobby employee punches out on a time clock. These items are not to reenter the store but must be consumed in the designated employee lunch area with a purchase receipt maintained by the purchaser.

3. No purses or bulky clothing items will be carried into the Lobby Department. All purses will be checked into the Bottle Booth. In the case of males, no male employee will carry into the Lobby Department any baggage, carry-all bags or bulky clothing items. These must be checked by employees at the Bottle Booth.

4. Major purchases such as daily or weekly shopping lists must be filled after the employee checks out on the time clock. Such purchases must be checked out through the authorized checkers as designated by the Store Manager and approved by the Division Manager.

SUBJECT: PERSONAL APPEARANCE

UNIFORM

FEMALE: The Company prescribed uniforms which are issued to you should be worn properly. Take good care of your uniform and it will always look fresh.

MALE: White shirt and black bow tie.

BADGE

BOTH MALE AND FEMALE: A name badge must be worn at all times—when you go into a store, don't you like to know the person with whom you are dealing?

HAIR

FEMALE: Hair should be well groomed in an easy to keep style.

MALE: Sideburns are not to exceed below ear lobe. Ears are to be visible and hair not to be of length to go over shirt collar.

FACE

FEMALE: Use cosmetics sparingly—be conservative. Keep teeth clean—avoid bad breath.

SUPREME COURT OF THE UNITED STATES

No. 73-1363

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

J. WEINGARTEN, INC.

ORDER ALLOWING CERTIORARI—Filed April 29, 1974

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. The case is set for oral argument in tandem with No. 73-765.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1974 550000 275

In the Supreme Court of the United States

OCTOBER TERM, 1973

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

J. WEINGARTEN, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1A–7A) is reported at 485 F. 2d 1135. The decision and order of the Board (Pet. App. C, pp. 9A–30A) are reported at 202 NLRB No. 69.

JURISDICTION

The judgment of the court of appeals (Pet. App. B, p. 8A) was entered on October 9, 1973. On December 29, 1973, Mr. Justice Powell extended the Board's time for filing a petition for a writ of certiorari to

533-924—74——1

and including March 8, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether it is an unfair labor practice for an employer to refuse an employee's request for the presence of her union representative at an investigatory interview with the employer which the employee reasonably believes will result in disciplinary action.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

> *Section 7.* Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
>
> *Section 8(a).* It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *

STATEMENT

The Board (two Members dissenting) held (Pet. App. C, pp. 9A–11A) that respondent J. Weingarten,

Inc. (the Company) violated Section 8(a)(1) of the National Labor Relations Act by refusing the request of its employee, Leura Collins, for the presence of her union representative at an investigatory interview relating to suspected theft of Company property by her, and insisting that she participate in the interview without that representative. In its decision in this case the Board followed its earlier decisions in *Mobil Oil Corp.*, 196 NLRB 1052, enforcement denied, 482 F. 2d 842 (C.A. 7), and *Quality Manufacturing Co.*, 195 NLRB 197, enforcement denied on this issue, 481 F. 2d 1018 (C.A. 4), pending on petition for writ of certiorari, No. 73–765. As the Board explained in *Mobil Oil Corp.*, 196 NLRB 1052, "it is a serious violation of the employee's individual right to engage in concerted activity by seeking the assistance of his statutory representative if the employer denies the employee's request and compels the employee to appear unassisted at an interview which may put his job security in jeopardy." In the present case the Board ordered the Company, *inter alia*, to cease and desist from requiring any employee, who has requested the presence of his union representative, to take part in an interview, which he has reasonable grounds to believe may result in disciplinary action, without the presence of that representative (Pet. App. C, p. 28A).

The court of appeals, relying on its prior decision in *Texaco, Inc.* v. *National Labor Relations Board*, 408 F. 2d 142, and "strengthened by the recent opinions of the Seventh and Fourth Circuits * * *" in *Mobil* and *Quality, supra,* declined to enforce the Board's order (Pet. App. A, p. 4A). In the court's view, "an inves-

tigatory interview would be a premature stage at which to invoke a requirement of union representation in the absence of some showing that the purpose of the interview was not merely to elicit facts concerning employee conduct but to impose disciplinary measures upon the employee so that grievance hearings later on would merely put the seal on the employer's prejudgment" (Pet. App. A, p. 7A).

REASONS FOR GRANTING THE WRIT

This case presents the same issue as *International Ladies' Garment Workers' Union* v. *Quality Mfg. Co., et al.*, No. 73–765, petition for a writ of certiorari pending. Although the Board did not file a petition in No. 73–765, it recognized that the issue is an important and recurrent one and did not oppose the granting of the union's petition in that case (Memorandum for the National Labor Relations Board, No. 73–765, pp. 3–4). For the same reasons, review is warranted in the present case.

CONCLUSION

Accordingly, we respectfully submit that this petition for a writ of certiorari should be granted. If the Court grants the petition in No. 73–765, it may deem it appropriate to defer action on the present petition until it has decided No. 73–765, and then dispose of it in accordance with that decision.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

MARCH 1974.

APPENDIX A

In the United States Court of Appeals for the Fifth Circuit

NO. 73-1891
SUMMARY CALENDAR [1]

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

J. WEINGARTEN, INC., RESPONDENT

Application for Enforcement of an Order of the National Labor Relations Board (Texas Case)

October 9, 1973

Before BROWN, *Chief Judge,* DYER and SIMPSON, *Circuit Judges*

DYER, *Circuit Judge.* The National Labor Relations Board, pursuant to section 10(e) of the National Labor Relations Act, 29 U.S.C.A. § 160(e), seeks enforcement of its order finding that J. Weingarten, Inc., violated section 8(a)(1) of the NLRA, 29

[1] Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

U.S.C.A. § 158(a)(1), by refusing to allow a union representative to be present at an investigatory interview with an employee. We conclude that, under the facts found by the Administrative Law Judge, there was no legal requirement for a union representative to be present and accordingly we deny enforcement of the Board's order.

I.

The facts are essentially undisputed. Weingarten operates a series of retail stores and Leura Collins has been employed by the Company in its lunch counter or "lobby department" at store #98. In mid-June 1972, Don Hardy, a loss prevention specialist working for Weingarten, was asked to observe Collins to determine whether reports of her stealing from the store were true. Hardy observed nothing unusual during a day and one-half at the store, but he did learn from Joe York, the manager of store #98, that another employee, Jewel Moody, had reported a theft by Collins the previous day. When this report was verified with Moody, Hardy and York called Collins to a meeting in the employee's lounge at a time when no one else was present.

At the meeting Collins was confronted with the charges of theft. She denied any wrongdoing and offered an apparently plausible explanation for her actions. She also asked either "Shouldn't the Union be in on this?" or "Could I have Billie [the Union representative] with me?" Whatever the exact question, the response in essence was, "No, this is a private matter." A short time later, Collins' explanation was verified and she was told that the matter was closed.

When told this, Collins became emotional and stated that the only things she had ever taken from Weingarten were her free lunches. This revelation came as a

surprise to both York and Hardy who believed that this was directly contrary to store policy. They began questioning Collins again to determine the scope of this practice. Faced with the reopening of the interview, she again requested the presence of the Union steward and was again told that the interview was a private matter. The interview finally ended when Hardy learned that employees at some Weingarten stores did in fact get free lunches and that the policy was unclear at store #98. Collins was given the rest of the day off and was told not to discuss the matter with anyone.

II.

The Board asserts that the interview, in which it found Collins had reason to fear for her job, was a proper place for union representation and argues that the denial of that representation constituted an 8(a)(1) violation. Its position is based on the decisions in *Quality Manufacturing Co.*, 1972, 195 N.L.R.B. No. 42, 79 LRRM 1269, and *Mobil Oil Corp.*, 1972, 196 N.L.R.B. No. 144, 80 LRRM 1188, and is best stated in the following passage from *Mobil:*

> An employee's right to union representation upon request is based on Section 7 of the Act which guarantees the right of employees to act in concert for "mutual aid and protection." The denial of this right has a reasonable tendency to interfere with, restrain, and coerce employees in violation of Section 8(a)(1) of the Act. Thus, it is a serious violation of the employee's individual right to engage in concerted activity by seeking the assistance of his statutory representative if the employer denies the employee's request and compels the employee to appear unassisted at an interview which may put his job security in jeopardy. Such a dilution of the employee's right to act collectively to protect

his job interests is, in our view, unwarranted interference with his right to insist on concerted protection, rather than individual self-protection, against possible adverse employer action.

The company responds on two fronts. First they argue that Collins did not make sufficiently clear her requests for union representation and that her continuation with the interview after her requests were denied constituted permission for the interview. Secondly, they question the merits of the legal rule advanced by the Board in *Mobil* and *Quality*, and argue that the proper rule was established by this Court in *Texaco, Inc., Houston Producing Division v. NLRB*, 5 Cir. 1969, 408 F.2d 142.

III.

As a preliminary matter, we conclude from a careful reading of the record that Collins adequately raised the question of union representation and we know of no rule that would require her to halt the interview completely in order to be able to raise before the Board and this Court the question of her right to that representation. Consequently, we face squarely the question decided by the Board in *Mobil* and *Quality*, and reject the rule enunciated there. Our conviction in this regard is strengthened by the recent opinions of the Seventh and Fourth Circuits which denied enforcement of the comparable portions of the Board's orders in *Mobil* and *Quality*. *Mobil Oil Corp. v. NLRB*, 7 Cir. 1973, —— F.2d —— [No. 72-1415, July 17, 1973]; *NLRB v. Quality Manufacturing Co.*, 4 Cir. 1973, —— F.2d —— [No. 72-1663, July 19, 1973].

Our inquiry into the merits must initially focus on the nature of the confrontation between Collins on the one hand and York and Hardy on the other. There has

been no suggestion that the meeting was anything other than a preliminary fact-finding interview. Indeed the Board in its brief before this Court consistently refers to the meeting as an investigative interview. As we said in our *Texaco* decision on related facts, there is no evidence that the company sought to deal with the employee about the consequences of her misconduct: "[t]he function of the interview was to question [the employee], not to bargain with [her]." 408 F.2d at 144.

With the interview thus defined, it is not surprising that the company seeks to rely on a long line of Board decisions, each of which indicates—either directly or indirectly—that no union representative need be present. *See, e.g., Illinois Bell Telephone Co.*, 1971, 192 N.L.R.B. No. 138; *Texaco, Inc., Los Angeles Terminal*, 1969, 179 N.L.R.B. 976; *Wald Manufacturing Co.*, 1970, 176 N.L.R.B. 839, *aff'd*, 6 Cir. 1970, 426 F.2d 1328; *Dayton Typographic Service, Inc.*, 1969, 176 N.L.R.B. 357; *Jacobe-Pearson Ford, Inc.*, 1968, 172 N.L.R.B. No. 84; *Chevron Oil Co.*, 1967, 168 N.L.R.B. No. 574; *Dobbs Houses, Inc.*, 1964, 145 N.L.R.B. 1565. *See also NLRB v. Ross Gear & Tool Co.*, 7 Cir. 1947, 158 F.2d 607. The Board does not expressly repudiate those decisions, but attempts to distinguish them by finding a violation of Collins' section 7 rights by virtue of the nature of the investigative interview.

In addition to its own precedent, the Board is well aware that it must distinguish the Fifth Circuit *Texaco* case or that decision would be binding precedent upon us, absent en banc reconsideration. In *Texaco*, the Board's order, which found both an 8(a)(1) and an 8(a)(5) violation, was denied enforcement when we found no requirement for union representation at an investigative interview. The Board contends that

533-924—74——2

that case was essentially a "refusal to bargain" case which did not put at issue any other section 7 rights. This contention was considered by the Fourth Circuit in *Quality* and rejected by the following language, which we adopt in full.

> Every situation wherein an employee is directed by management to cooperate in an investigatory interview carries the implicit threat of discipline if such direction is not obeyed. And the statement that a particular Section 7 right [the right to act in concert for mutual aid and protection] mentioned in the above quotation had not been previously considered is inaccurate when examined in the context of the case before us. As illustrated by the cases cited in this opinion, the Board has many times been confronted with an alleged violation of Section 8(a)(1) in the context of a denial of union representation at employer-employee interviews. By necessary implication, Section 7 rights have been at issue in each of these cases. Yet never has it been thought, as the Board would hold here, that such rights require an employer to permit an employee to have a union representative present whenever the employee "has reasonable ground to fear that the interview will adversely affect his continued employment, or even his working conditions."

—— F. 2d at —— (footnote omitted).

The crux of this case thus hinges on a proper interpretation of section 7 of the NLRB.[2] The Board centers its argument on the language guaranteeing

[2] Section 7 of the NLRB, 29 U.S.C.A. § 157, provides: Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities

employees the right to act in concert for mutual aid and protection. This right is triggered, it contends, when an employee being interviewed has a reasonable basis for believing that his job is in jeopardy. Thus it concludes that a denial of requested representation at that point constitutes a violation of section 8(a)(1).[3] We disagree.

While a basic purpose of section 7 is to allow employees to engage in concerted activities for their mutual aid and protection, such a need does not arise at an investigatory interview. To extend the scope of the Act's protection to such preliminary contacts between an employee and his employer would be to apply an overbroad interpretation to section 7. We follow the Seventh Circuit's decision in *Mobil, supra,* but we find it unnecessary at this time to approve or disapprove that part of the opinion (see —— F.2d at ——) which placed great emphasis on the economic pressure function of section 7. We believe that an investigatory interview would be a premature stage at which to invoke a requirement of union representation in the absence of some showing that the purpose of the interview was not merely to elicit facts concerning employee conduct but to impose disciplinary measures upon the employee so that grievance hearings later on would merely put the seal on the employer's prejudgment.

This interpretation of the scope of section 7 is consistent with our decision in *Texaco* and agrees with the conclusions of the Fourth and Seventh Circuits.

Enforcement denied.

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except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

[3] Section 8(a)(1), 29 U.S.C.A. § 158(a)(1) provides that it shall be an unfair labor practice for an employer, "to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 157 of this title [section 7]."

APPENDIX B

United States Court of Appeals
For the Fifth Circuit

No. 73–1891

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

J. WEINGARTEN, INC., RESPONDENT,

JUDGMENT

Before BROWN, *Chief Judge,* DYER and SIMPSON, *Circuit Judges*

This cause came on to be heard upon an application of the National Labor Relations Board for enforcement of a certain order issued by it against Respondent, J. Weingarten, Inc., its officers, agents, successors, and assigns. The Court, having carefully considered the briefs and transcript of record filed in this cause, and being fully advised in the premises, and having determined the case appropriate for disposition without oral argument, on October 9, 1973, handed down its decision denying enforcement of the Board's Order. In conformity therewith it is hereby.

ORDERED AND ADJUDGED by the United States Court of Appeals for the Fifth Circuit that the said order of the National Labor Relations Board in said proceeding be denied.

Entered: OCTOBER 9, 1973.

APPENDIX C

202 NLRB No. 69

United States of America before the National Labor Relations Board

Case 23—CA—4401

J. WEINGARTEN, INC.

AND

RETAIL CLERKS UNION, LOCAL UNION NO. 455, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL–CIO

DECISION AND ORDER

On November 21, 1972, Administrative Law Judge Joseph I. Nachman issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Respondent filed exceptions and supporting briefs.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and

[1] We note and correct the following error in that section of the Administrative Law Judge's Decision entitled "Findings of Fact" which in no way affects the results of this case. The Administrative Law Judge correctly found that Collins testified that her request that a representative of the Union be present was refused, but stated that her request was allegedly refused by Perry, rather than by York.

conclusions of the Administrative Law Judge and to adopt his recommended Order.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that Respondent, J. Weingarten, Inc., Houston, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order and that the complaint, herein, to the extent that it alleges a violation of Section 8(a)(5) of the Act, be, and it hereby is, dismissed; provided however, that:

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[2] Members Fanning and Jenkins, for the reasons set forth in their dissents in *Collyer Insulated Wire*, 192 NLRB No. 150, and *Radioear Corporation*, 199 NLRB No. 137, dissent from the recommendation of the Administrative Law Judge that the alleged 8(a)(5) violation be deferred to arbitration and they would proceed to determine the dispute on its merits.

Member Kennedy, for the reasons set forth in his dissenting opinions in *Quality Manufacturing Company*, 195 NLRB No. 42, and *Mobil Oil Corporation*, 196 NLRB No. 144, dissents from the conclusion of the Administrative Law Judge that the Respondent engaged in unfair labor practices proscribed by Sec. 8(a)(1) of the Act by denying Collins' request for union representation during her interview.

Member Penello would also dismiss the 8(a)(1) allegation because it is clear from the record that Respondent was merely conducting an investigative rather than a disciplinary interview. See *Western Electric Company, Hawthorne Works*, 198 NLRB No. 82, and *National Can Corporation*, 200 NLRB No. 156.

Jurisdiction of this proceeding is hereby retained for the limited purposes stated in The Remedy section of the attached Decision.

Dated, Washington, D.C.

Edward B. Miller,
Chairman,
John H. Fanning,
Member,
Howard Jenkins, Jr.,
Member,
Ralph E. Kennedy,
Member,
John A. Penello,
Member,
National Labor Relations Board.

United States of America Before the National Labor Relations Board, Division of Judges, Washington, D.C.

Case No. 23–CA–4401

J. WEINGARTEN, INC.

and

RETAIL CLERKS UNION LOCAL UNION NO. 455, RETAIL CLERK'S INTERNATIONAL ASSOCIATION, AFL–CIO

William H. Helms, Esq., Houston, Texas, for the General Counsel

Fulbright, Crooker & Jaworski, by *Neil Martin, Esq.*, Houston, Texas, for Respondent

DECISION

Statement of the Case

JOSEPH I. NACHMAN, *Administrative Law Judge.* This case tried before me at Houston, Texas, on September 28,[1] with all parties present and duly represented, involves a complaint[2] pursuant to Sec-

[1] This and all dates herein are 1972, unless otherwise stated.

[2] Issued August 8, on a charge filed June 20, and amended July 17.

Section 10(b) of the National Labor Relations Act, as amended (herein the Act), which alleges in substance, that J. Weingarten, Inc. (herein Respondent or Company), (a) in the course of interviewing Leura Collins, an employee whom Respondent suspected of having engaged in an act of dishonesty, refused Collins' request that a representative of Retail Clerks Union, Local No. 455, Retail Clerks International Association, AFL–CIO (herein Union, or Local 455), the collective-bargaining representatives of Respondent's employees in an appropriate unit, be present at such interview, thereby violating Section 8(a)(1) of the Act, and (b) unilaterally changed a term and condition of employment of employees in the unit represented by Local 455, thereby violating Section 8(a)(5) of the Act. For reasons hereafter stated I find and conclude that Respondent violated Section 8(a)(1) of the Act by denying Collins' request for union representation at her interview, and that the issue with respect to the alleged violation of Section 8(a)(5) of the Act should be deferred to arbitration is accordance with the agreement of the parties.

At the trial all parties were afforded full opportunity to examine and cross-examine witnesses, to introduce relevant and material evidence, to argue orally on the record, and to submit briefs. Oral argument was waived. Briefs submitted by the General Counsel and Respondent, respectively, have been duly considered. Upon the pleadings, stipulations of counsel, the evidence, including my observation of the demeanor of the witnesses while testifying, I make the following:

FINDINGS OF FACT[3]

THE UNFAIR LABOR PRACTICES ALLEGED

BACKGROUND

Respondent operates a chain of approximately 100 retail stores. Some years ago each store had a lunch counter, but as new stores opened, so-called lobby operations were substituted for the lunch counter operation. The Union has been recognized for many years as the collective-bargaining representative of Respondent's sales personnel. The last contract between Respondent and the Union, applicable to such employees, was entered into September 9, 1971, effective through September 9, 1974. The contract contains the following pertinent provisions:

> Article 4—Discharge and Discrimination
>
> * * * * *
>
> B. An employee may be discharged for proper cause, and the Employer shall give notice in writing of such discharge to the Union. The employer shall not discharge any employee without proper cause and shall give at least one (1) written warning notice of the specific complaint or complaints against such employee to the employee and to the Union, except that no warning notice need be given to an employee, before discharge, if the cause of such discharge is dishonesty . . .
>
> * * * * *
>
> Article 18—Dispute Procedure
>
> A. The Union shall have the right to designate store stewards for each store.

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[3] No issue of commerce or labor organization is presented. The complaint alleges, and by answer Respondent admitted facts which establish those jurisdictional elements. I find those facts to be as pleaded.

B. Should any differences, disputes, or complaints arise over the interpretation or application of the contents of this Agreement, there shall be an earnest effort on the part of both parties to settle such promptly through the following steps:

Step 1. By conference between the aggrieved employee and/or store steward, Union business representative, or either, and the manager of the store.

Step 2. By conference between the Union business representative and/or store steward and the District or Zone Manager.

Step 3. By conference between an official of the Union and the President of the Employer or his designate.

Step 4. In the event the last step fails to settle satisfactorily the complaint, it may be referred to arbitration by either party.

C. In the event the parties cannot agree upon the selection of an arbitrator within fifteen (15) days from the date of referral of the controversy to arbitration, the arbitrator shall be selected in the following manner.

The Federal Mediation and Conciliation Service shall be jointly requested by the parties to name a panel of seven (7) arbitrators. The parties shall then choose the arbitrator by alternately striking a name from the list until one (1) name remains as the arbitrator chosen by the parties and empowered to arbitrate the dispute.

The arbitrator shall be authorized to rule and issue a decision and award in writing on any issue presented for arbitration, including the question of the arbitrability of such issue. His decision and award shall be final and binding upon the parties to this Agreement. Where more than one employee is a part of a common

grievance, it shall be heard as a single grievance. The fees of the arbitrator shall be borne one-half (½) by the Union and one-half (½) by the Employer party to the arbitration.

The arbitrator shall have no power to add to, subtract from, alter, amend, modify or project beyond its meaning any of the terms and provisions of this Agreement.

The time limit set forth in this Article may be extended upon mutual agreement of the parties.

D. No grievance will be considered or discussed which is presented later than fifteen (15) calendar days after such has happened excepting for any and all claims involving wages, which may be presented within six (6) months. Grievances that have progressed through Step 1 of the dispute procedure must be submitted in writing to be considered in Step 2.

E. The parties agree that grievances may arise of a general nature affecting or tending to affect several employees, and that such grievances may be initiated at any of the above mentioned steps deemed appropriate by the parties.

To guard against loss due to dishonesty on the part of employees and/or the public, the Company employs a number of persons classified as "Loss Prevention Specialist" who work mainly undercover among the several stores. These operatives carry no arms, nor are they identified with any law enforcement agency. At all times material, Don Hardy was employed in the capacity mentioned, and his immediate superior was Company Vice President Hal Burnett.

The Instant Case

Denial of Union Representation

Leura Collins was initially employed by Respondent about 1961, for work at Store No. 2. This is a store which has a lunch counter, and Collins was told at the time of her hire that she would be entitled to a lunch and a drink each day she worked, free of cost to her. Collins availed herself of this privilege. About October 1970, when Store No. 98 first opened for business, Collins was transferred to that Store and was working there at the time of the events hereafter referred to. Store 98 being of the lobby type, does not have a lunch counter, and Collins was assigned to work in the lobby. According to Collins' uncontradicted and credited testimony, she was never told that the free lunch situation at Store 98 would be any different from that which had prevailed at Store No. 2, and the evidence shows that she as well as most, if not all the employees in the lobby department, including the manager of that department, took lunch from the lobby without paying for it.[4]

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[4] Respondent introduced evidence to the effect that prior to opening a new store, a management official conducts an indoctrination course for the employees of each department, at which it would have been his duty to inform employee of the provisions of Respondent's manual which requires that employees purchase such items as milk and cookies for lunch while off the clock, and that such items must be consumed in designated lunch areas, with the purchase receipt retained by the employee. Collins credibly testified that she did not attend such a meeting,

On or about June 15, Loss Prevention Specialist Hardy was directed by his superior to investigate a complaint that an employee in the lobby at Store 98 was taking money from the cash register. The name given Hardy as the suspected employee was Leura Collins. Hardy spent the rest of that day and the following day observing the lobby, but saw nothing to indicate dishonesty on the part of anyone. The following day, just before noon, Hardy went to the store, introduced himself to Manager York whom he had not theretofore known, and told the latter that he observed the lobby department for about 2 days, but found nothing wrong. At this point York told Hardy that just that morning employee Moody had told him that she had observed Collins purchasing a box of chicken which sold for $2.98 and for which she had paid $1.00. After lunch, Hardy and York called Moody to an area of the second floor where York's desk is located, and where they interviewed her relative to the report York had received. Moody confirmed that she had observed what she had therefore reported to York. Moody was then excused, and York sent for Collins.

Before Collins came upstairs to where Hardy and York were, they moved away from York's desk and more into the center of the area used primarily as the employee lounge. No employees were in the area at the time. York testified this was done to make the conversation more private. When Collins arrived, Hardy was introduced as a representative of Respond-

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and there is no evidence that the manual provision was in fact brought to her attention or the attention of any other employee. Although the testimony shows that a copy of the manual was kept in the lobby department, there is no testimony that Collins in fact referred to it, and she credibly testified that she did not do so.

ent's security office.[5] Hardy began questioning Collins about the purchase of the chicken. She readily admitted that before going to work on June 15, she purchased some chicken, a loaf of bread and a cake which she paid for and donated to her church for a dinner the latter was giving. When questioned about the quantity of chicken she has purchased, Collins explained that she purchased four pieces for which the price was $1.00, but that because the store was out of the small size boxes, the chicken was put into the larger box normally used when a greater quantity is purchased. At this point Hardy went to the selling floor and asked Moody if the store was in fact out of the smaller size boxes. Moody confirmed that this was a fact, and that they had been unavailable in the store when Collins purchased the chicken. Hardy then asked Moody if she knew how many pieces of chicken were in the box that Collins purchased. When Moody replied that she did not have such information, and only knew that it was the large size box, Hardy returned to the interview area and told Collins that he had verified the information she had given; that he was sorry if she had been inconvenienced, but that the matter had been cleared up and was now closed.[6]

Collins testified that several times while she was being questioned by Hardy about the purchase of the chicken, she asked Store Manager York that Union Steward Brockett, or some other representative of the Union be present, and that Perry refused saying

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[5] Throughout her testimony, Collins referred to Hardy as the detective. I find nothing in the evidence to warrant the inference that Collins had any reason to believe that Hardy had any official authority, or that he was anything other than what he was introduced to be.

[6] My findings to this point are based on a composite of the credited testimony of Collins, Hardy and York, which, to the extent mentioned is not in material dispute.

this was a private matter between her and the Company, and that his presence was all that was necessary. Both Hardy and York testified that Collins did not ask for union representation during the questioning, but only asked shouldn't someone from the Union be here, and that had she in fact requested such representation during the questioning, the interrogation would have been promptly terminated. I do not regard this as a conflict in the testimony. Even assuming that Collins used the words Hardy and York attributed to her, while perhaps not quite as articulately expressed as by one more fluent in the English language, it was in her way of expressing herself, a request that a representative of the Union be present during her interrogation, and York's reply that he did not regard this as necessary was legitimately understood by her to be a denial of her request.

The Alleged Section 8(a)(5) Violation

When Hardy returned to the interview area and told Collins as above stated, that the matter of her purchase of the chicken was closed, Collins began crying and spontaneously remarked that the only thing she had ever gotten from the store without paying for it was her free lunch. Both Hardy and York expressed astonishment that employees were getting a free lunch, and questioned Collins closely about the practice, what employees were getting a free lunch, the frequency with which she got such lunch, and the nature thereof. Hardy began preparing a statement of the facts, particularly trying to compute how much Collins owed Respondent for the free lunches she had gotten, arriving at a figure of about $160. Because Collins continued to insist that she was entitled to her lunch free of charge, Hardy left the area and made

a telephone call to his superior, Hal Burnett. Hardy told Burnett about Collins' claim that she was entitled to a free lunch, and Burnett said he would look into the matter and call Hardy back. While Hardy was making his call to Burnett, Collins again asked York if she could have a union steward with her, but that York again refused. When Hardy returned from his call to Burnett, he continued taking his statement from Collins, but she informed York that she would not sign it. About this time Hardy went to take Burnett's call, and was told by Burnett that it was the practice in some stores for employees to get free lunches, but that he had been unable to ascertain what the practice was at Store 98. With this information Hardy returned to where Collins and York were, and terminated the interrogation of Collins.

When the interrogation of Collins ceased, York asked Collins not to discuss the matter with anyone, because he considered it private between her and the Company, and of no concern to others. Collins did, however, report all aspects of the incident first to her shop steward, and immediately thereafter, at the steward's suggestion, to a representative of the Union. Immediately following the interrogation of Collins, Manager York discussed the matter of free lunches with Lobby Department Manager Odoms. She told York that the practice of free lunches in the department did exist, and that in fact she took free lunches. The following day York issued orders that the practice cease immediately. As a result of this the Union filed a grievance with the Company, pursuant to the terms of the contract, which, in pertinent part, reads:

> 6. *Details of grievance, etc.*: The employees in the Lobby Department of Weingarten #98 have always received their lunches and

drinks free, as of Friday, June 16, 1972 this practice was discontinued. This is a reduction in benefits that these employees are entitled to.

7. *Settlement requested.* That these employees be given their lunches and drinks as it has always been done in the past.

Respondent accepted the aforementioned grievance and expressed its willingness to process it pursuant to and in accordance with the grievance procedure provided in the contract. Union Agent Phillips testified that the Union decided to defer processing of its said grievance until such as the outcome of this proceeding is known to it.

CONTENTIONS AND CONCLUSIONS

1. The Alleged Denial of Union Representation

In *Mobile Oil Corporation,* 196 NLRB No. 144, the Board relying on its prior decision in *Quality Manufacturing Company,* 195 NLRB No. 42, held that:

> * * * it is a serious violation of the employee's individual right to engage in concerted activity by seeking the assistance of his statutory representative if the employer denies the employee's request and compels the employee to appear unassisted at an interview which may put his job security in jeopardy. Such a dilution of the employees' right to act collectively to protect his job interests is, in our view, unwarranted interference with his right to insist on concerted protection, rather than individual self-protection against possible adverse employer action.

Apply[ing] the principles enunciated in *Mobile Oil, supra,* to the facts of the instant case, I must and do find and conclude Respondent's interrogation of Collins, under the facts of this case violated Section 8(a)(1) of the Act. Having heretofore found that Collins

requested union representation at the interview, and that her request was denied by York the only real question to be decided is whether under all circumstances Collins could reasonably conclude that the interview might put her job security in jeopardy. I find that she could so reasonably conclude.

Although Collins when first notified that she was wanted upstairs, thought that the subject to be discussed with her was the possibility of a transfer to another store, the interview had not proceeded very far before she learned that Hardy, as a representative of respondent's security department, was questioning her concerning a possible act of dishonesty on her part, relating to the performance of her duties as an employee. Under these circumstances Collins could certainly reasonably conclude that action might be taken by Respondent which would put her job security in jeopardy.[7] That neither Hardy nor York had authority to impose discipline on Collins, as Respondent argues, is beside the point. To Collins the possibility of discipline was just as real whether the discipline that might be visited upon her was imposed immediately by Hardy and/or York, or at some future time by the President of the Company. Equally beside the point is Respondent's argument that Collins was not in fact "afraid of her job," that she was not afraid of being accused of something because she knew

[7] Particularly in a retail store, dishonesty on the part of an employee, when established to an employer's satisfaction, is normally regarded as an unpardonable offense, and the penalty imposed therefor, except under the most unusual circumstances, is discharge. Even Respondent's witness, Joe Perry, virtually admitted as much, and to the extent that his testimony may be regarded as indicating that Respondent follows a more lenient policy, I regard it as mere puffing, which I do not credit.

she had done nothing wrong, and that the concern she expressed in her testimony for her job was merely an afterthought on her part. As the Board held in *Quality Manufacturing, supra,* in determining whether an employee has reasonable ground to fear that an interview may adversely affect his continued employment is to be measured by objective standards in light of all the circumstances of the case. As heretofore indicated, that standard was clearly satisfied here.

Accordingly, I find and conclude that by denying Collins' request for union representation at the interview conducted by Hardy and York, Respondent violated Section 8(a)(1) of the Act.

The Section 8(a)(5) Allegations

As heretofore indicated, when York ascertained, as a result of the interview with Collins, that many if not all the employees in the lobby department were obtaining their lunch in the store without paying for it, he gave orders that the practice be forthwith terminated. That there was no notice to or bargaining with the Union concerning this change is conceded. The General Counsel contends that this was a unilateral change in wages, hours and terms and conditions of employment, and hence violated Section 8(a)(5) and (1) of the Act. However, the evidence also shows that promptly upon learning of York's order that employees no longer have free lunches, the Union filed a grievance thereon pursuant to the grievance and arbitration provisions of the collective bargaining agreement, requesting that the status *quo ante,* be restored. In support of its position that on this aspect the Board should defer to the arbitration procedures, Respondent relies upon the Board's decision in *Collyer*

Insulated Wire etc., 192 NLRB No. 150, and the subsequent line of cases following it, while the General Counsel argues that the matters here in dispute are not covered by the grievance and arbitration provisions of the contract. As heretofore indicated, Respondent accepted the grievance, and in its answer herein, reiterated at the trial, expressed its willingness, indeed its desire, that the matter in dispute be determined in the manner specified in the contract. The Union, however, has not pursued its grievance because it first wishes to ascertain what relief it will obtain in the instant proceeding.

In *Collyer, supra,* and the later cases refining its application, the Board has made it clear that the *Collyer* rule will be applied where two basic conditions have been met, namely (1) the dispute is in fact susceptible of resolution under the operation of the grievance procedure agreed to by the parties, and (2) there is no reason to believe that resort to the procedures agreed upon by the parties will not bring about resolution of the issues in a manner compatible with the purposes of the Act. *Eastman Broadcasting Company, Inc.,* 199 NLRB No. 58, slip opinion pp. 11–12. The dispute procedure set up in the contract between the parties provides that it shall apply to "any differences, disputes, or complaints aris[ing] over the interpretation or application of the contents of this agreement," which is to be resolved through a four step procedure culminating in binding arbitration. Although the arbitrator is prohibited from making any award which has the effect of subtracting from, altering, amending or modifying any term or provision of the agreement, the arbitrator is authorized to make a final and binding award "on any issue presented for arbitration, including the question of the arbitrability of such issue."

This language, if there is any practical distinction between it and the contract language in *Eastman Broadcasting, supra,* is even broader in that in the instant case the arbitrator is authorized to determine the arbitrability of the dispute.[8] Nor do I find on this record, any reason to believe that the machinery provided by the parties will not result in a resolution of the instant dispute in a manner compatible with the purposes and policies of the Act. At least it will be time enough for the Board to intervene if and when future events demonstrate that the anticipated result has not been accomplished.

Accordingly, I find and conclude that without deciding the merits of the dispute concerning the entitlement of the lobby employees to free lunches, and without prejudice to any party, this aspect of the complaint herein should be dismissed, but that jurisdiction over that issue should be retained solely for the purpose of entertaining appropriate and timely motions for further consideration upon a proper showing that either (a) the dispute has not, with reasonable promptness been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) the grievance or arbitration procedures have not been fair and regular or have reached a result which is repugnant to the Act.

---

[8] Even if, as the General Counsel argues, "the prime requirement . . . for deferral . . . is that the subject matter . . . must be the subject of the terms of [the] contract,"—a contention apparently in conflict with the Board's decision in *Eastman Broadcasting, supra,* and the cases there cited in fn. 14—we have in the instant case, by virtue of the grievance filed by the Union for processing pursuant to contract procedure, and Respondent's acceptance of that grievance, for processing in accordance with the contract, an *ad hoc* agreement to resolve the instant dispute in the manner specified in the agreement between the parties.

Upon the foregoing findings of fact and the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2) of the Act, and is engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By denying Collins' request for union representation at an interview conducted by Respondent under circumstances from which Collins could reasonably conclude that her job security was in jeopardy, Respondent interfered with, coerced and restrained employees in the exercise of rights guaranteed by Section 7 of the Act, and thereby engaged in, and is engaging in unfair labor practices proscribed by Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

5. It would best effectuate the policies of the Act if, without prejudice to any party and without deciding whether the termination of free lunches for the lobby employees violated Section 8(a)(5) of the Act, the parties be relegated to the grievance-arbitration procedures of the contract.[9]

[9] Respondent argues that as the alleged Section 8(a)(5) violation must be deferred to arbitration, the alleged Section 8(a)(1) violation should also be so deferred. Respondent cites no authority for this position, and simply argues that the arbitrator will thus be able to dispose of the entire dispute. The General Counsel on the other hand, argues that as the Board must in any event take jurisdiction of the Section 8(a)(1) violation, it should also decide the Section 8(a)(5) allegations,

The Remedy

Having found that Respondent engaged in unfair labor practices, I shall recommend that it be required to cease and desist therefrom, and take certain affirmative action designed and found necessary to effectuate the policies of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record in the case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[10]

ORDER

Respondent, J. Weingarten, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Requiring any employee to take part in an interview or meeting without union representation, if such representation has been requested by the employees and if the employee has reasonable grounds to believe that the matters to be discussed may result in his being subject to disciplinary action.

---

and thus decide the entire controversy, citing *Metal Worker's International Association etc. (George Kock Sons, Inc.)*, 199 NLRB No. 26. Language in that decision appears to support the General Counsel's position. However, on the facts of this case, I find applicable the Board's decision in *Joseph T. Ryerson & Sons, Inc.*, 199 NLRB No. 44. There the Board decided one aspect of the case, but deferred another aspect to arbitration.

[10] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

2. Take the following affirmative action designed and found necessary to effectuate the policies of the Act:

(a) Post at its Store No. 98, Houston, Texas, copies of the attached notice marked "Appendix."[11] Copies of said notice, to be furnished by the Regional Director of the Board for Region 23 (Houston, Texas) after being signed by an authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the aforesaid Regional Director, in writing within 20 days from the date of this Order, what steps it has taken to comply herewith.

It Is Further Ordered, that the complaint herein, to the extent that it alleges a violation of Section 8(a)(5) of the Act, be and the same is dismissed, provided, however, that jurisdiction of this proceeding is hereby retained for the limited purpose of entertaining an appropriate and timely motion for further consideration upon a proper showing that either (a) the dispute has not, with reasonable promptness after issuance of this Decision, either been resolved by

[11] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) the grievance or arbitration procedure has not been fair and regular or has reached a result which is repugnant to the Act.

Dated at WASHINGTON, D.C.

JOSEPH I. NACHMAN,
Administrative Law Judge.

APPENDIX JD-783-72

FORM (NLRB-4727 (5-69))

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT require that any employee take part in an interview or meeting without union representation if the employee requests such representation and if the employee has reasonable grounds to believe that the matters to be discussed at such interview or meeting may result in his being subject to disciplinary action.

J. WEINGARTEN, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Dallas-Brazos Building, 1125 Brazos Street, Houston, Texas 77002 (Tel. No. (713) 226-4296)

U.S. GOVERNMENT PRINTING OFFICE: 1974

SUPREME COURT

FILED

APR 8 19

MICHAEL RODAK, JR.

No. 73-1363

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NATIONAL LABOR RELATIONS BOARD,

Petitioner

v.

J. WEINGARTEN, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR J. WEINGARTEN, INC. IN OPPOSITION

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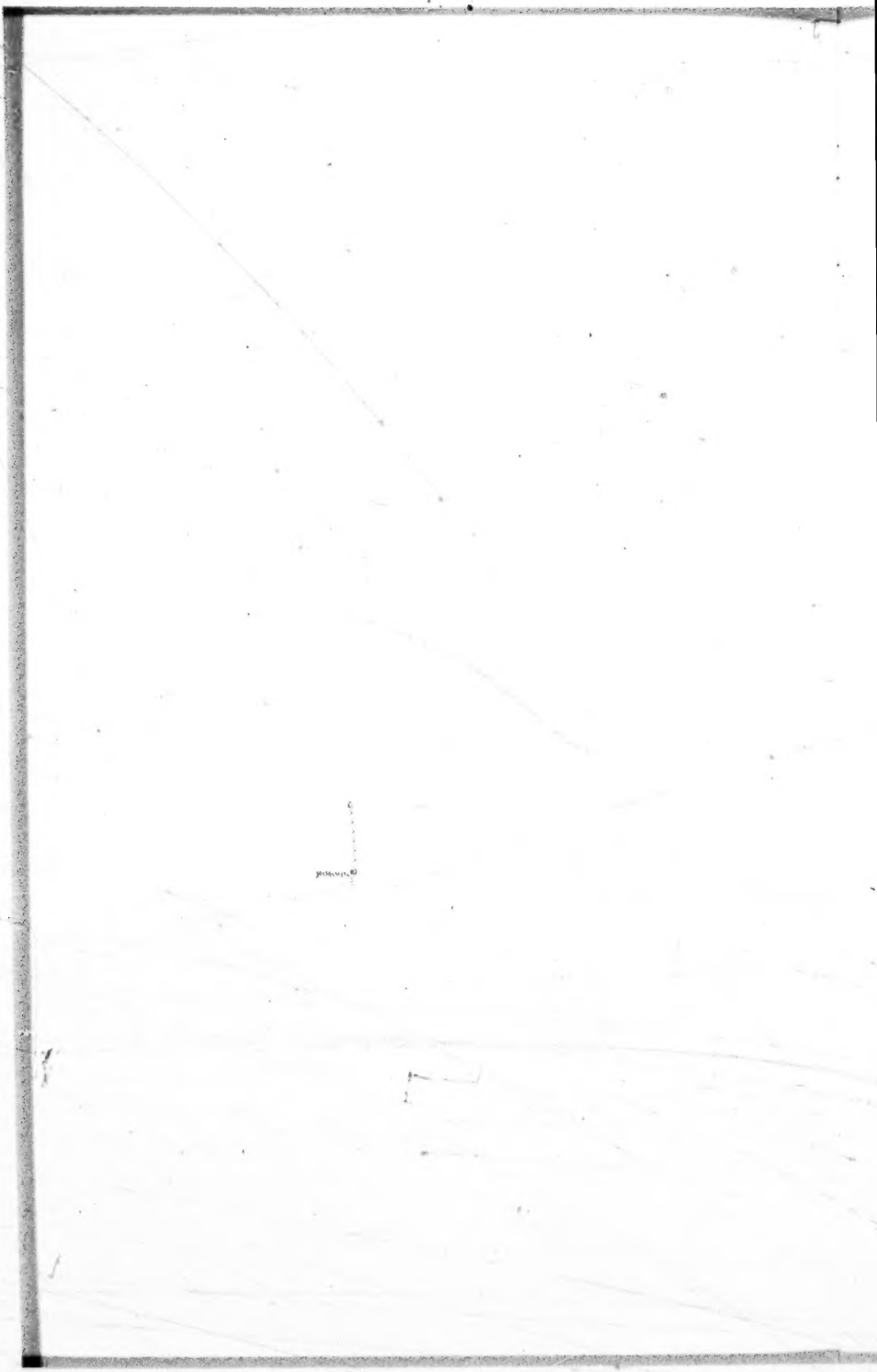

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BRIEF FOR J. WEINGARTEN, INC. IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1A-7A) is reported at 485 F.2d 1135. The Board's decision and order are reported at 202 NLRB No. 69 (Pet. App. C, pp. 9A-30A).

JURISDICTION

The judgment of the court of appeals was entered on October 9, 1973, and the Board's time for filing a petition for writ of certiorari was extended by Mr. Justice Powell

to and including March 8, 1974. This court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the court below properly determined that it is not an unfair labor practice for an employer to refuse an employee's request for the presence of her union representative at an investigatory interview with the employer.

STATUTE INVOLVED

The relevant portions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in the petition at p. 2.

STATEMENT

Following the Board's decision (with two members dissenting) that respondent, J. Weingarten, Inc. (the Company), violated Section 8(a)(1) of the National Labor Relations Act, as amended, in refusing the request of its employee, Leura Collins, for the presence of her union representative at an investigatory interview (Pet. App. C, pp. 9A-11A), the Board sought enforcement of its decision in the Fifth Circuit Court of Appeals.

The Board before the court of appeals relied upon the decisions in *Quality Manufacturing Co.*, 195 NLRB 197, enforcement denied on this issue, 481 F.2d 1018 (4th Cir. 1973), pending on petition for writ of certiorari, No. 73-765 and *Mobil Oil Corp.*, 196 NLRB No. 144 (1972), enforcement denied 482 F.2d 842 (7th Cir. 1973). (Pet. App. A, p. 3A).

The court of appeals found that there had been no suggestion by the Board that the interview was anything other than a preliminary fact-finding interview and that there was "no evidence that the company sought to deal with the employee about the consequences of her misconduct . . ." (Pet. App. A, pp. 4A-5A).

The court of appeals also adopted the Fourth Circuit's language in *Quality, supra,* that every situation where an employee is directed by a representative of management to cooperate in an investigatory interview carries with it the "implicit threat" of discipline if the direction is not obeyed and that "by necessary implication, Section 7 rights have been at issue in each of these cases." These courts of appeals identified above have observed that it had never been thought, as the Board would attempt to show here, that such Section 7 rights would require any employer to permit the employee's union representative to be present whenever the employee had a "reasonable ground to fear that the interview will adversely affect his continued employment, or even his working conditions." (Pet. App. A, p. 6A).

The interpretation of the court of appeals *instanter* corresponds with the conclusions of the Fourth and Seventh Circuits in holding that the basic purpose of Section 7 is to permit employees to engage in concerted activities for their mutual aid and protection and that such a need does not arise at an investigatory, fact-finding interview. The court below declared that "to extend the scope of the Act's protection to such preliminary contacts between an employee and his employer would be to apply an overbroad interpretation to section 7."

Thus, three courts of appeals have uniformly held that an investigatory interview is a premature stage at which to invoke a requirement of union representation in the absence of some showing that the interview was for a purpose of not merely eliciting facts concerning employee conduct. (Pet. App. A, pp. 6A-7A).

ARGUMENT

The Board did not file a petition for a writ of certiorari in either *Mobil, supra,* or *Quality, supra.* The decision of the court of appeals that an investigatory interview would be a

premature stage at which to invoke a requirement of union representation in the absence of a showing that the interview was not merely to elicit facts concerning employee conduct is legally sound, and review thereof by this Court is not warranted.

The Board's argument that such conduct is violative of the Act where the employee "reasonably believes that the interview will result in disciplinary action" is subject to the most fundamental suspicion and unchecked fabrication. The theory of the Board in this case rests upon the employee's testimony following the investigation as to her own state of mind and as to the employer's suspected course of conduct subsequent to the interview. The respondent submits that the view of the Board abandons the principles of objective evidence and disregards the realities of industrial life in placing reliance upon a test of subjective "reasonable grounds" in determining if an employer's interview is violative of the Act or is within the permissible limits of its provisions.

To support the Board's position would create industrial confusion and render an employer guilty of an unfair labor practice on the mere unfounded apprehensions of an employee whose attitude may be extremely hostile to such employer subsequent to (or during) questioning of the employee's suspected work behavior.

Thus, the court below, in considering the reach of Section 7 rights as a whole, correctly determined that the Board did not expressly repudiate prior decisions which either directly or indirectly indicate that no representation need be present in a fact-finding interview and that the requested union representation at an investigatory interview is not the kind of "concerted activity" with which Section 7 is primarily concerned.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

NEIL MARTIN

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Of Counsel:

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1363

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

J. WEINGARTEN, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1A-7A)[1] is reported at 485 F. 2d 1135. The decision and order of the Board (Pet. App. 9A-30A) are reported at 202 NLRB No. 69.

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[1] "Pet. App." refers to the appendix to the petition. "A." refers to the separate appendix to the briefs.

JURISDICTION

The judgment of the court of appeals (Pet. App. 8A) was entered on October 9, 1973. On December 29, 1973, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to and including March 8, 1974. The petition was filed on that date and was granted on April 29, 1974 (A. 101).[2] The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

> Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
>
> Section 8(a). It shall be an unfair labor practice for an employer—

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[2] The case is set for oral argument in tandem with *Int'l Ladies' Garment Workers' Union* v. *Quality Mfg. Co.*, No. 73-765, which presents a similar issue.

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; * * *

QUESTION PRESENTED

Whether it is an unfair labor practice for an employer to refuse an employee's request for the presence of his union representative at an investigatory interview with the employer which the employeee reasonably believes may result in disciplinary action, and to require the employee to undergo the interview without such assistance.

STATEMENT

A. The Board's Findings of Fact

Respondent (the Company) operates a chain of approximately 100 retail stores, and its sales personnel are represented for collective bargaining purposes by Retail Clerks Union, Local 455 (the Union) (Pet. App. 14A). In past years each store had a lunch counter, but as new stores opened the lunch counter was replaced by a lobby department[3] (Pet. App. 14A; A. 80-81). Leura Collins was initially hired in 1961 to work behind the lunch counter in Store No. 2 (Pet. App. 17A; A. 30-31, 38-39). When hired, Collins was informed that all employees were entitled to a free lunch for each day worked (Pet. App. 17A; A. 32). In October 1970, Store No. 98

[3] This is a "more sophisticated" food operation, wherein employees prepare and sell a variety of specialty items such as barbecued meats, kosher foods, imported cheeses, and fancy breads (A. 80-81).

was opened for business and Collins was transferred there to work in the lobby (Pet. App. 17A; A. 32). After her transfer, Collins and all the other lobby department employees continued to take a free lunch each day (Pet. App. 17A; A. 31-32).

To guard against loss from shoplifting and employee dishonesty, the Company has a security department which employs individuals classified as "Loss Prevention Specialist[s]"; they work undercover in all the stores operated by the Company (Pet. App. 16A; A. 50-51, 53). Dishonesty on the part of an employee, when established to the Company's satisfaction, is ground for discharge unless exceptional mitigating circumstances exist (Pet. App. 23A, n. 7; A. 84-88). The collective bargaining agreement between the Company and the Union[4] provides that the Company cannot discharge an employee without giving "at least one (1) written warning notice of the specific complaint * * * to the employee and to the Union, except that no warning notice need be given to an employee, before discharge, if the cause of such discharge is dishonesty * * *" (Pet. App. 14A; A. 92).[5]

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[4] The contract relevant here was entered into September 9, 1971, effective through September 9, 1974 (Pet. App. 14A).

[5] The contract further provides that:

> The Union may * * * file a written complaint with the Employer within seven (7) days after the Union receives notice of such discharge. Said complaint must be taken up within seven (7) days from the date it is filed with the Employer, by the Union's representative and the Employer's designated representative, and it may be

On June 15, 1972, "specialist" Don Hardy investigated a complaint that Leura Collins was taking money from the cash register (Pet. App. 18A; A. 52-53). Hardy spent that and the next day observing the lobby in Store No. 98, but did not notice anything unusual (Pet. App. 18A; A. 53). On June 17, Hardy went to Store No. 98 about noon, introduced himself to Store Manager Joe York, and told him that he had been observing the lobby for the past two days but had seen nothing indicating dishonesty by Collins or any other employee (Pet. App. 18A; A. 53, 68). York then stated that lobby employee Jewell Moody had just reported that on the previous day Collins had purchased a box of chicken which sold for $2.98, but had placed only $1.00 in the cash register (*ibid.*). After lunch, Hardy and York talked with Moody, who repeated what she had told York earlier that day (Pet. App. 18A; A. 53-54, 68-69).

York summoned Collins to a private area on the second floor where he and Hardy were waiting (Pet. App. 18A; A. 33, 55, 69). York introduced Hardy as a representative of the Company's security office who "would like to talk to her about a few things" (Pet. App. 18A-19A; A. 55, 69). Hardy asked Col-

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referred to the Board of Arbitration in the event the Union and the Employer's designated representative fail to reach an agreement. Should the Board determine that it was an improper discharge, the Employer shall reinstate the employee in accordance with the finding of the Board of Arbitration. [A.92, Article 4.B.]

lins whether she had purchased approximately $3.00 worth of chicken and paid only $1.00 for it. Collins replied, "I didn't get that amount of chicken * * * I got a dollar's worth of chicken * * * and I paid Jewell [Moody] for it" (Pet. App. 19A; A. 33-34, 55-56, 69). As Collins described her reaction (A. 34):

> So, I began to feel then, you know, that something was going to happen, and I got scared about my job, and I asked could I have Billie * * * the union representative there, with me.[6]

York refused her request[7] (Pet. App. 19A-20A; A. 34, 42-44, 56, 70). Several other times during the interview, Collins asked that her union representative be present; each time the request was denied (Pet. App. 19A-20A; A. 35-36, 42-43, 71).

---

[6] Billie Brockett, the Union steward, was an employee at the store (A. 34, 77).

[7] Collins testified that York told her she "couldn't have" union representation (A. 34). York, who was corroborated by Hardy (A.56, 59-60), testified that Collins asked: "Shouldn't the Union be present?" And he responded: "Leura, I think it's kind of a private matter between us and the company, and yourself, and us, and I really think, it should be kept that way. I really don't see the need for it, because we're just trying, you know, asking questions and maybe clear up a matter" (A. 70). The Examiner concluded that, "Even assuming that Collins used the words Hardy and York attributed to her, * * * it was in her way of expressing herself, a request that a representative of the Union be present during her interrogation, and York's reply that he did not regard this as necessary was legitimately understood by her to be a denial of her request" (Pet. App. 20A).

As the interview progressed, Hardy asked Collins if she had "ever taken any money from the cash register" or if she had ever put some of the proceeds from a sale into her pocket rather than in the register (A. 62-63, 34). Collins replied that she had never done so. She explained that she had been working for the Company for 11 years, was the only support for herself and her son, and would not risk losing her job (A. 34). With respect to the chicken incident Collins told the investigator that the store had been out of the smaller chicken boxes the day before, so that the chicken she bought was put into a larger box than ordinarily used for a $1.00 purchase (Pet. App. 19A; A. 56, 69, 47). Hardy then left the interview to check with employee Moody, who confirmed that the store had been out of small size chicken boxes the day before and admitted that she did not know how many pieces of chicken were in the box Collins bought (Pet. App. 19A; A. 56, 69).

Returning to the interview, Hardy told Collins that her explanation was accepted and that the matter was cleared up (Pet. App. 20A; A. 56). Collins broke into tears and blurted out that "I have never taken anything from the Company that I haven't paid for except for the free lunches" (Pet. App. 20A; A. 35, 57, 70). Both Hardy and York immediately began to question Collins about employee free lunches, since they were unaware of such practice (Pet. App. 20A; A. 35, 57, 70-71). During the questioning, Hardy wrote up a statement which in-

cluded a computation that Collins owed the Company $160 for free lunches (Pet. App. 20A; A. 36, 58, 71-72). When Collins continued to insist that she was entitled to a free lunch, Hardy again left the interview to call his superior to check the matter.

As York described Collins' reaction (A. 71, see also Pet. App. 21A; A. 36):

> * * * Mrs. Collins said, "Couldn't I have Billie Brockett present?"
>
> I said, "Well, Leura, you know, it's still basically a private conversation between us, and we're just trying to clear up some matters."
>
> So, she had a few tears in her eyes. She wasn't hysterical or what you would call an emotional person about it. She had some tears and this type of thing, but not hysterical.

Hardy returned and completed taking a statement from Collins, which she refused to sign (Pet. App. 21A; A. 36, 63-64). Before the interview terminated, Hardy received a call from Company Vice President Hal Burnett who explained that it was the practice in some stores to give free lunches; Burnett had been unable to ascertain what the practice was at Store No. 98 (Pet. App. 21A; A. 58, 72). Hardy and York then ended the interrogation of Collins; they asked her not to discuss the matter with anyone and gave her the rest of the day off (Pet. App. 21A; A. 36, 72). However, Collins reported all aspects of the interview to her union steward; and, at the steward's suggestion, she informed the Union about it (Pet.

App. 21A; A. 36-37). The Union filed unfair labor practice charges with the Board (A. 2).[8]

B. The Board's Decision

The Board (Members Kennedy and Penello dissenting) concluded that the Company violated Section 8(a)(1) of the Act by denying Collins' request for union representation and continuing to interview her concerning allegations of dishonesty (Pet. App. 24A). The Board found that, since Collins was being interrogated about her possible acts of dishonesty during her employment, she "could certainly reasonably conclude that action might be taken by [the Company] which would put her job security in jeopardy" (Pet. App. 23A). Accordingly, following its prior decisions in *Mobil Oil Corp.*, 196 NLRB 1052, enforcement denied, 482 F. 2d 842 (C.A. 7), and *Quality Manufacturing Co.*, 195 NLRB 197, enforcement denied, 481 F. 2d 1018 (C.A. 4), certiorari granted April 29, 1974, No. 73-765, the Board held that "it is a serious violation of the employee's individual right

[8] Following the interview with Collins, York discussed the question of free lunches with Lobby Department Manager Odoms and learned that taking them was a general practice (Pet. App. 21A; A. 74-75). The next day York issued orders that the practice cease immediately (*ibid.*). The charges filed by the Union not only covered the denial of union representation, but also alleged that the Company had violated Section 8(a)(5) of the Act by unilaterally changing a condition of employment. The Board, pursuant to the deferral-to-arbitration policy adopted in *Collyer Insulated Wire*, 192 NLRB 837, "dismissed" the latter allegation (Pet. App. 24A-26A, 29A-30A). No issue involving that action is involved here.

to engage in concerted activity by seeking the assistance of his statutory representative if the employer denies the employee's request and compels the employee to appear unassisted at an interview which may put his job security in jeopardy" (Pet. App. 22A, quoting *Mobil Oil Corp., supra*).

The Board ordered the Company to cease and desist from "[r]equiring any employee to take part in an interview or meeting without union representation, if such representation has been requested by the employees and if the employee has reasonable grounds to believe that the matters to be discussed may result in his being subject to disciplinary action" (Pet. App. 28A).

C. The Decision of the Court of Appeals

The court of appeals denied enforcement of the Board's order. The court agreed with the Board that Collins had adequately requested union representation at the interview and that the Company had refused her request and continued the interview (Pet. App. 4A). However, characterizing the interrogation as a "preliminary fact-finding interview" (Pet. App. 5A), the court held that, "[t]o extend the scope of the Act's protection to such preliminary contacts between an employee and his employer would be to apply an overbroad interpretation to section 7." The court added: "We believe that an investigatory interview would be a premature stage at which to invoke a requirement of union representation in the absence of some showing that the purpose of the in-

terview was not merely to elicit facts concerning employee conduct but to impose disciplinary measures upon the employee so that grievance hearings later on would merely put the seal on the employer's prejudgment" (Pet. App. 7A).

SUMMARY OF ARGUMENT

I.

Section 7 of the National Labor Relations Act guarantees to employees the right "to engage in * * * concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *." When an employee and his union representative attend an investigatory interview which the employee reasonably believes may result in discipline, they are engaging in a clear form of protected concerted activity. The employee is seeking "aid or protection" against a perceived threat to his employment, while the union representative's presence is an expression of the interest and concern of the employee complement as a whole that none of their number be disciplined unfairly.

It is conceded that an employee is entitled to representation when challenging a decision to impose discipline. The employee's need for the protection of union representation when the employer's investigation threatens his job security is at least as great as it is after the decision to impose discipline has been made. Fright, inexperience, or ignorance may expose the employee to discipline which could have

been avoided had he been assisted by knowledgeable union representation. Moreover, grievance proceedings typically come only after discipline has been imposed; at that point, the employer would be more likely to attempt to justify his action, than to reexamine it in the new light contributed by the employee's representative.

Recognition that an employee has a statutory right to refuse to participate without union representation in an interview in which the risk of discipline reasonably inheres also harmonizes with actual industrial practice. "[T]here is a well-established current of arbitral authority sustaining the right of such representation * * *" *Chevron Chemical Co.*, 60 LA 1066, 1071 (1973). Moreover, collective bargaining agreements in major industries provide for union representation at investigatory interviews which are likely to lead to discipline.

The Board's position does not infringe upon any legitimate interest of the employer. The employer has the option of foregoing the interview if he prefers not to examine the employee in the presence of his representative. The employee under investigation would then have the choice of either proceeding without representation, or allowing the investigation to take its course without his participation and then attempting to defend himself at the subsequent grievance stage with the benefit of representation. Moreover, even if the employer allows the employee to be accompanied by a union representative, he is free to insist on obtaining the employee's, and not the repre-

sentative's, account of the matter under investigation.

Precedents dealing with the employer's bargaining obligation in relation to the disciplinary process are not controlling here. The Board acknowledges that the duty to bargain does not arise prior to the employer's decision to impose discipline. However, an employer may not restrain his employees in their exercise of a right protected by Section 7 simply because the employer is not under an additional statutory obligation to bargain with the employee's union representative. See *National Labor Relations Board* v. *Washington Aluminum Co.*, 370 U.S. 9.

II.

Leura Collins was warranted in fearing that discipline could result from her meeting with Company representatives Hardy and York. She was being questioned for suspected theft. Such an offense, if proven to the Company's satisfaction, could result in immediate discharge. Even though the Company representatives could not impose sanctions, their report would be the basis upon which those who would make that decision would act, without giving Collins any further opportunity to present her side of the story.

ARGUMENT

I. AN EMPLOYER VIOLATES SECTION 8(a)(1) OF THE ACT BY DENYING AN EMPLOYEE'S REQUEST FOR THE PRESENCE OF HIS UNION REPRESENTATIVE AT AN INVESTIGATORY INTERVIEW WHICH THE EMPLOYEE REASONABLY BELIEVES WILL RESULT IN DISCIPLINARY ACTION, AND BY REQUIRING THE EMPLOYEE TO PARTICIPATE IN THE INTERVIEW WITHOUT SUCH ASSISTANCE

Section 7 of the National Labor Relations Act guarantees to employees the right "to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *." All agree that the imposition of discipline is a proper subject of a grievance and that Section 7 protects the right of employees to present grievances to the employer through their union representative. Indeed, the court below acknowledged that an employee is entitled to union representation when the employer has decided "to impose disciplinary measures upon the employee," for otherwise "grievance hearings later on would merely put the seal on the employer's prejudgment" (Pet. App. 7A).[9] The issue here is whether Section 7 also entitles the employee to union representation at an investigatory interview which the employee reasonably believes may result in discipline against him.

[9] See also *National Labor Relations Board* v. *Quality Mfg. Co.*, 481 F. 2d 1018, 1024, n. 1 (C.A. 4), certiorari granted April 29, 1974, No. 73-765.

1. When an employee, accompanied by his union representative, attends an investigatory interview which the employee reasonably believes may result in discipline, the employee and the representative are engaged in "concerted activities for the purpose of * * * mutual aid or protection." The employee is seeking "aid or protection" against a perceived threat to his job status. The union representative, by his presence, is manifesting the solidarity of the other employees in the bargaining unit with the employee facing disciplinary action and their concern that punishment not be imposed unjustly.[10] His presence also assures the other employees in the bargaining unit that they will be afforded similar aid should they become vulnerable to discipline.[11]

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[10] "The quantum of proof that the employer considers sufficient to support disciplinary action is of concern to the entire bargaining unit. A slow accretion of custom and practice may come to control the handling of disciplinary disputes. If, for example, the employer adopts a practice of considering foreman's unsubstantiated statements sufficient to support disciplinary action, employee protection against unwarranted punishment is affected [footnote omitted]. The presence of a union steward allows protection of this interest by the bargaining representative." Comment, *Union Presence in Disciplinary Meetings*, 41 U. of Chi. L. Rev. 329, 338 (1974).

[11] "Employee protests designed to show support for a grievant and simultaneously to focus attention on the dispute have been held protected even though only a single employee is threatened by employer action [footnote omitted]. These cases have found mutual aid or protection in the assurance such protests afford all employees that they can rely on their fellow workers should they become targets of discipline [citing *National Labor Relations Board* v. *Peter C. K. Swiss Chocolates Co.*, 130 F. 2d 503, 505-506 (C.A. 2)]. * * * Although the

To interpret Section 7 as protecting an employee from compulsory attendance without union representation at an interview which he reasonably believes may result in discipline effectuates the policies of the Act by allowing concerted action at a time when it is most needed.[12] The employee's need for the protection of union representation at such an interview is at least as great as it is after the decision to impose discipline has been made.

Fright, inexperience, or ignorance may expose the employee to an improper fact determination which could have been avoided if he had the aid of knowledgeable union representation at his interview. If a

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union presence is unlike walkouts or work stoppages in that it comes at a time when no employer action has yet been taken, it is correspondingly less disruptive than the latter forms of concerted activity. Steward presence may in fact prevent creation of the type of situation in which walkouts and work stoppages occur * * *." *Union Presence in Disciplinary Meetings, supra,* at 339-340.

[12] In *Mobil Oil Corp.* v. *National Labor Relations Board,* 482 F. 2d 842, the Seventh Circuit acknowledged that, "[i]n a literal sense it may be true * * * that if a Union representative attends an interview with an employee, the two are engaged in 'concerted activity,' and also that their purpose is 'mutual aid or protection'" (*id.* at 846). It rejected the Board's position, *inter alia,* because of its view that the "basic thrust of § 7 is to enable employees to organize and to apply economic pressure against their employers in appropriate situations" (*id.* at 846-847). It is clear, however, that Section 7 is not limited to such situations, as the court below recognized in not accepting that part of the Seventh Circuit's reasoning (Pet. App. 7A). See *National Labor Relations Board* v. *Interboro Contractors, Inc.,* 388 F. 2d 495 (C.A. 2); *National Labor Relations Board* v. *Ben Pekin Corp.,* 452 F. 2d 205 (C.A. 7).

representative were present he could aid the employee by eliciting favorable facts, assuring that the employee's side of the story is fully told, and, if necessary, serving as a brake on overzealous and improper interrogation techniques. See *Thrifty Drug Stores Co., Inc.*, 50 LA 1253, 1261-1262 (1968); *Pick-N-Pay Supermarkets, Inc.*, 52 LA 832, 833-834 (1969). If, on the other hand, the employer makes his finding in a closed conference with the employee, from which the representative is excluded, it becomes increasingly difficult for the employee to vindicate himself at a later time and the value of representation at that time is correspondingly diminished. If a hearing is held prior to the imposition of discipline, the issue is no longer the employee's guilt or innocence, but only the severity of the discipline. A formal grievance challenging the employer's finding of guilt can ordinarily be filed only after the employee has been discharged or otherwise disciplined,[13] and, at that point, the employer would be prompted to at-

[13] Collective agreements customarily provide that grievances concerning discharge may be filed only after the discharge. 1 CCH, LLR Union Contracts, Arbitration ¶ 59,520, pp. 84,988-84,989. Only 9 percent of union contracts require predischarge hearings (2 BNA Collective Bargaining Negotiations & Patterns 40:4), and only 12 percent provide for advance notification to the union of discharge (*id.* at 40:3).

Under the contract here, the Company was not required to give a warning notice prior to discharge if the cause for discharge was dishonesty (p. 4, *supra*). Accordingly, had the Company been satisfied, based on its investigation, that Collins was guilty of dishonesty, it could have discharged her without further notice.

tempt to justify his action, rather than to reexamine it.

The Act rests on the reality that "[a] single employee was helpless in dealing with an employer," and that "[u]nion was essential to give laborers opportunity to deal on equality with their employer." *American Steel Foundries* v. *Tri-City Trades Council*, 257 U.S. 184, 209. Its design is to establish the conditions of equality by protecting recourse to collective action and thereby to overcome the "relative weakness of the isolated wage earner caught in the complex of modern industrialism * * *." S. Rep. No. 573, 74th Cong., 1st Sess. 3. To compel the employee without the aid of union representation to submit to an interview which may lead to his discipline, tends to perpetrate the very inequality which the Act denounces, and to bar recourse to the very means which the Act safeguards to overcome that inequality. The Board's interpretation of Section 7 avoids this anomalous result. As the Board explained in *Mobil Oil Corp.*, 196 NLRB 1052:

> An employee's right to union representation upon request is based on Section 7 of the Act which guarantees the right of employees to act in concert for "mutual aid and protection." The denial of this right has a reasonable tendency to interfere with, restrain, and coerce employees in violation of Section 8(a)(1) of the Act. Thus, it is a serious violation of the employee's individual right to engage in concerted activity by seeking the assistance of his statutory representative if the employer denies the employee's

> request and compels the employee to appear unassisted at an interview which may put his job security in jeopardy. Such a dilution of the employee's right to act collectively to protect his job interests is, in our view, unwarranted interference with his right to insist on concerted protection, rather than individual self-protection, against possible adverse employer action * * *.

2. Recognition that an employee has a statutory right to refuse to participate without union representation in an interview in which the risk of discipline reasonably inheres harmonizes with industrial practice. Cf. *Fibreboard Corp.* v. *National Labor Relations Board*, 379 U.S. 203, 211. Collective bargaining agreements often accord the employee the right to union representation at investigatory interviews which are likely to lead to discipline. See 1 BNA Collective Bargaining Negotiations and Contracts 21:22 (General Motors Corp. and Auto Workers, 76(a)); 27:6 (Goodyear Tire & Rubber Co. and Rubber Workers, V(5)); 28:15 (United States Steel Corp. and Steelworkers, 101.2).[14] Moreover, even where such a right is not explicitly provided in the collective bargaining agreement, "there is a well-established current of arbitral authority sustaining the right of such representation where the situation

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[14] The fact that the right to union representation at investigatory interviews may be guaranteed by contract does not preclude it from also being guaranteed by statute. The right to representation at the grievance stage is conceded to be protected by the Act; yet it is commonly guaranteed by collective agreement as well. See generally Dunau, *Contractual Prohibition of Unfair Labor Practices: Jurisdictional Problems*, 57 Colum. L. Rev. 52, 66-80 (1957).

is such that the employee who is called in for interrogation has reasonable cause to anticipate that the interview will result in the development of information which will be utilized as the basis for disciplinary action against him." *Chevron Chemical Co.*, 60 LA 1066, 1071 (1973); accord: *Universal Oil Products Co.*, 60 LA 832, 834 (1973).

3. The right of participation of union representatives, at the employee's request has a beneficial effect for employers as well as employees, and has been applied by the Board so as to protect the employer's legitimate interests. The benefits which may accrue to an employer are well stated in *Union Presence in Disciplinary Meetings*, *supra*, 41 U. of Chi. L. Rev. at 344:

> Early union involvement will allow the steward to discourage the prosecution of frivolous grievances. Early union review of employer decisions will also give the employer an opportunity to correct errors that might produce ill feeling among employees. At the time of the meeting neither party is locked into any position, but as a grievance proceeds, the ability to compromise diminishes. The inadequacy of grievance procedures for fact finding affects both employers and unions. Union representation could guarantee a better understanding of the infraction charged, and early, informal consideration of the merits of possible grievances might reduce the costs that the employer must bear in formalized grievance procedures. [Footnotes omitted.]

See also *Independent Lock Co. of Alabama*, 30 LA 744, 746 (1958); *Caterpillar Tractor Co.*, 44 LA 647, 651 (1965).

At the same time the Board has construed Section 7 so as to avoid interference with an employer's prerogatives. As the Board stated in *Mobil, supra*, 196 NLRB 1052:

> The employer may, if it wishes, advise the employee that it will not proceed with the interview unless the employee is willing to enter the interview unaccompanied by his representative. The employee may then refrain from participating in the interview, thereby protecting his right to representation, but at the same time relinquishing any benefit which might be derived from the interview. The employer would then be free to act on the basis of information obtained from other sources.

Thus, an employer who considers that allowing employee union representatives to leave their work stations to participate in an employee interview would be unduly disruptive of the work schedule [15] may deny such permission.[16] The employee under investi-

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[15] In *Mobil, supra*, the Seventh Circuit expressed concern that "from the standpoint of management, and indeed the entire economy, the delays and costs associated with an adversary, or semi-adversary, fact-finding process may impose burdens on efficient management which a cost-conscious, competitive business cannot tolerate." 482 F. 2d at 846.

[16] However, the employer's legitimate concerns about disruption of the work schedule can usually be alleviated by rules requiring employees to obtain the assistance of off-duty stewards or scheduling interviews during non-work time. Cf. *Universal Oil Products Co., supra*, 60 LA at 834-835 (1973).

gation would then have the choice of either proceeding without representation, or allowing the investigation to take its course without his participation and then attempting to defend himself at the subsequent grievance stage with the benefit of representation.

Moreover, even if the employer allows the employee to be accompanied by a union representative, he has no duty to bargain with the representative at that stage. The representative is present to assist the employee, and may attempt to clarify the facts or suggest other employees who may have knowledge of them. The employer, however, is free to insist that he is only interested, at that time, in hearing the employee's own account of the matter under investigation. As the Board emphasized in *Mobil*, *supra*, 196 NLRB 1052, n. 3: "we are not giving the Union any particular rights with respect to predisciplinary discussions which it otherwise was not able to secure during collective-bargaining negotiations."

Finally, the Board's interpretation limits the employee's right to insist on representation as a condition of participation to situations where the employee reasonably believes the investigation will result in disciplinary action. As the Board emphasized in *Quality*, *supra*, 195 NLRB at 199:

> We would not apply the rule to such run-of-the-mill shop-floor conversations as, for example, the giving of instructions or training or needed corrections of work techniques. In such cases there cannot normally be any reasonable basis

> for an employee to fear that any adverse impact may result from the interview, and thus we would then see no reasonable basis for him to seek the assistance of his representative.[17]

Thus, the Board held in *Dayton Typographic Service, Inc.*, 176 NLRB 357, 360-361, that an employer meeting with employees to investigate proofreading errors, which was part of a quality control program, did not require the presence of a union representative.

4. The court below reached its decision here by following its earlier decision in *Texaco Inc., Houston Producing Division* v. *National Labor Relations Board*, 408 F. 2d 142, denying enforcement of 168 NLRB 361 (Pet. App. 5A). However, *Texaco* is distinguishable. In *Texaco*, the employer refused to allow the union representation at an interview conducted after the employee had been suspended. In the Board's view, the company, which already knew the facts concerning the employee and his alleged theft, was "concluding its 'case' against him in order to provide a 'record' to support disciplinary action, if deemed appropriate." 168 NLRB at 362. The Board, reasoning that imposition of disciplinary affects the employee's terms and conditions of employment, concluded that Section 8(a)(5) of the Act pre-

[17] Nor is the "reasonable ground" standard objectionable because the violation will turn "on the subjective state of mind of the employee." *Quality, supra*, 195 NLRB at 200 (dissenting opinion). " 'Reasonable ground' will of course be measured * * * by objective standards under all the circumstances of the case." *Id.* at 198, n. 3 (majority opinion).

cluded the employer from refusing to deal with the union, and dealing directly with the employee, concerning such terms and conditions.

The court of appeals, however, disagreed with the Board's characterization of the interview. It found that "[t]he evidence is overwhelming that the interview was investigatory in nature and there is absolutely no evidence that the [employer] sought to deal with [the employee] about the *consequences* of his alleged misconduct." It concluded that, "since the interview dealt only with eliciting facts and not with the consequences of the facts revealed, its subject matter was not within the scope of compulsory collective bargaining." 408 F. 2d at 144-145 (italics in original).[18]

The Board agrees that the duty to bargain does not arise prior to the employer's decision to impose discipline.[19] However, it does not follow from the fact that the employer's statutory obligation to meet with the union representative is confined to a disciplinary

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[18] While the employer refused to allow the representative to be present, it also advised the employee "that he would not be required to continue with the interview if he did not wish to do so" (408 F. 2d at 144). Thus, under the Board's current view, the employer's conduct in *Texaco* would not have violated Section 8(a)(1) of the Act.

[19] See *Jacobe-Pearson Ford*, 172 NLRB 594, where the Board found that collective bargaining with the union was not required because the " 'potential' for discipline was remote and the purpose of the meeting" with the employee was "essentially for the gathering of information" (*id.* at 595). Cf. *National Can Corp.*, 200 NLRB No. 156, 82 LRRM 1096.

interview of the employee that the employer can compel the unrepresented attendance of an employee at an investigatory interview. Stated otherwise, an employer may not restrain his employees in their exercise of a right protected by Section 7 simply because the employer is not under an additional statutory obligation to bargain with the employee's union representative.[20]

The validity of the Board's conclusion that the Act protects an employee from compulsory attendance, without union representation, at an interview with his employer which he reasonably fears may result in discipline, is not impaired because some earlier decisions may be read as reaching a contrary conclusion. These decisions do not reflect a considered analysis of the issue.[21] Moreover, as the Court has

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[20] For example, an employer may not discharge his unorganized employees who walk off the job in a body because he ignored their complaint about the lack of heat in the plant. *National Labor Relations Board* v. *Washington Aluminum Co.*, 370 U.S. 9. Yet, since those workers do not have a statutory bargaining representative, the employer is under no obligation to meet and confer about the cold conditions in the plant.

[21] Thus, in *National Labor Relations Board* v. *Ross Gear & Tool Co.*, 158 F. 2d 607, 611-614 (C.A. 7), denying enforcement of 63 NLRB 1012, 1033-1034, the court found, contrary to the Board, that the meeting to which employee Ford was summoned did not involve a pending grievance, but only an attempt to iron out friction among the employees in her department. The court concluded that, in these circumstances, Ford's refusal to attend the meeting without the union committee amounted to insubordination, for which she was properly discharged. In *Chevron Oil Company*, 168 NLRB 574,

observed in another connection: "The nature of the problem, as revealed by unfolding variant situations, inevitably involves an evolutionary process for its rational response, not a quick, definitive formula as a comprehensive answer. And so, it is not surprising that the Board has more or less felt its way * * * and has modified and reformed its standards on the

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578-579, the Trial Examiner rejected the contention that it was a violation of the Act to deny employees union representation at a fact finding interview, noting that they were accorded representation at a subsequent meeting before discipline was actually imposed. The Board adopted the Examiner's decision without discussion of the issue. *Id.* at 574-575. Similarly, in *Dobbs Houses, Inc.*, 145 NLRB 1565, 1570, *Electric Motors & Specialties, Inc.*, 149 NLRB 1432, 1440, and *Illinois Bell Telephone Co.*, 192 NLRB 834, 835-836, the Board summarily adopted Trial Examiners' decisions which denied the right to union representation in an investigatory interview.

The other cases cited by the court below (Pet. App. 5A) are distinguishable. In *Wald Mfg. Co.*, 176 NLRB 839, the Trial Examiner stated, "I do not reach here the question whether if an employee expressed the desire for union representation at such an interview, the Company could lawfully refuse it * * *." (*Id.* at 846.) In *Texaco, Inc., Los Angeles Sales Terminal*, 179 NLRB 976, 987, the Trial Examiner found that the employee had no "reasonable ground for belief" that discipline would result from the interview. The Board adopted that finding and expressly declined to adopt the Examiner's "general discussion of an employee's right to union representation in other circumstances." *Id.* at 976, n. 1. In *Jacobe-Pearson Ford, Inc.*, 172 NLRB 594, the employer did not abridge the employee's right to union representation for he continued the investigation without interviewing the employee when the latter insisted on representation (*id.* at 598); the only question was whether, in so doing, the employer violated his bargaining obligation to the union (see n. 19, *supra*).

basis of accumulating experience." *Int'l Union of Electrical Workers* v. *National Labor Relations Board*, 366 U.S. 667, 674.[22]

II. COLLINS REASONABLY BELIEVED THAT THE INTERVIEW HERE MIGHT RESULT IN DISCIPLINE

As shown above (pp. 5-8), Collins had a reasonable apprehension that her interview might result in discipline. It is conceded that the employer was *in fact* investigating her alleged dishonesty. When Loss Prevention Specialist Hardy asked Collins whether she had taken more chicken than she had paid for, she became "scared about [her] job" and immediately requested the presence of her union representative. Her concern was warranted. The contract (*supra*, p. 4) provided that a single instance of dishonesty was grounds for discharge without the need for a

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[22] There has been a recent growth in the use of sophisticated techniques—such as closed circuit television, undercover security agents, and lie detectors—to monitor and investigate the employees' conduct at their place of work. See, e.g., *Warwick Electronics, Inc.*, 46 LA 95, 97-98 (1966); *Bowman Transportation, Inc.*, 59 LA 283, 286-292 (1972); *FMC Corp.*, 46 LA 335, 336-338 (1966). These techniques increase not only the employees' feelings of apprehension, but also their need for experienced assistance in dealing with them. Thus, often, as here and in *Mobil*, *supra*, an investigative interview is conducted by security specialists; the employee does not confront a supervisor who is known or familiar to him, but a stranger trained in interrogation techniques. These developments in industrial life warrant a concomitant reappraisal by the Board of their impact on statutory rights. Cf. *Boys Markets, Inc.* v. *Retail Clerks, Local 770*, 398 U.S. 235, 250.

warning notice for the first infraction. Thus, if the Company decided that Collins had in fact committed the infraction, it could have discharged her without further warning.[23]

Before the Board, the Company argued that, since York and Hardy had no authority to impose discipline on Collins, there was no reason for her to expect discipline to result from their questioning. That argument misses the mark. For those who would make the decision to discipline Collins would do so on the basis of the facts elicited at the interview with Hardy and York. Collins would have no further opportunity to present her side before the decision was made. In such circumstances, she could reasonably believe that discipline might result from the interview. The Board was thus warranted in concluding that the Company violated Section 8(a)(1) of the Act by compelling Collins to participate in the interview without her union representative.

[23] The court below stated: "We believe that an investigatory interview would be a premature stage at which to invoke a requirement of union representation in the absence of some showing that the purpose of the interview was not merely to elicit facts concerning employee conduct but to impose disciplinary measures upon the employee so that grievance hearings later on would merely put the seal on the employer's prejudgment" (Pet. App. 7A). Under the contract here, discipline could flow automatically from the employer's "finding" of guilt.

CONCLUSION

The judgment of the court of appeals should be reversed and the case should be remanded to that court with instructions to enforce the Board's order.

Respectfully submitted.

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No. 73-1363

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

J. WEINGARTEN, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR J. WEINGARTEN, INC.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1A-7A)[1] is reported at 485 F.2d 1135. The National Labor Relations Board's Decision and Order are reported at 202 NLRB No. 69 (Pet. App. 9A-30A).

JURISDICTION

The judgment of the court of appeals (Pet. App. 8A) was entered on October 9, 1973, and the Board's time for filing a petition for writ of certiorari was extended by Mr. Justice Powell on December 29, 1973 to and including March 8, 1974. The petition was filed on that date and was granted

[1] "Pet. App." refers to the Appendix to the petition for a writ of certiorari. "A." refers to the single Appendix before this Court.

on April 29, 1974 (A. 101),[2] This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Portions of the National Labor Relations Act, as amended, (61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 151, *et seq.*) relevant to the questions presented before this Court are as follows:

> "*Section 7.* Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective-bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
>
> "*Section 8.(a)* It shall be an unfair labor practice for an employer—
>
> "(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; . . .
>
> "*Section 9.(a)* Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a

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[2] By order of this Court, this case is set for oral argument in tandem with *International Ladies' Garment Workers' Union* v. *Quality Mfg. Co. and National Labor Relations Board,* No. 73-765, which presents an analogous issue.

> group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment. . . ."

QUESTION PRESENTED

Whether it is an unfair labor practice for an employer to refuse an employee's request for the presence of his union representative at an investigatory interview with the employer where the employee reasonably believes that the interview will adversely affect his continued employment or working conditions.

STATEMENT

I. The Board's Findings of Fact

The relevant findings of the Administrative Law Judge were adopted by the National Labor Relations Board. These are summarized as follows:

For a number of years J. Weingarten, Inc. (the Respondent) has maintained a collective-bargaining relationship for its Houston area retail grocery stores with the Retail Clerks Local Union No. 455, Retail Clerk's International Association, AFL-CIO (the Union) for its various sales personnel (Pet. App. 14A, A. 22-23).[3]

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[3] The last agreement between Respondent and the Union applicable to such employees was entered into on September 9, 1971, effective through September 9, 1974. The contract contains the following pertinent provisions:

In past years each of the Respondent's stores contained a lunch department; but in recent years, as new stores were opened, lobby departments, a new type of operation,[4] were installed in lieu of lunch departments (Pet. App. 14A; A. 23, 80-82).

"ARTICLE IV — DISCHARGE AND DISCRIMINATION

* * *

"B. An employee may be discharged for proper cause, and the Employer shall give notice in writing of such discharge to the Union. The Employer shall not discharge any employee without proper cause and shall give at least one (1) written warning notice of the specific complaint or complaints against such employee to the employee and to the Union, except no warning notice need be given to an employee, before discharge, if the cause of such discharge is dishonesty . . .

* * *

"ARTICLE XVIII — DISPUTE PROCEDURE

"A. The Union shall have the right to designate store stewards for each store.

"B. Should any differences, disputes, or complaints arise over the interpretation or application of the contents of this Agreement, there shall be an honest effort on the part of both parties to settle such promptly through the following steps:

Step 1. By conference between the aggrieved employee and/or store steward, Union business representative, or either, and the manager of the store.
Step 2. By conference between the Union business representative and/or store steward and the District or Zone Manager.
Step 3. By conference between an official of the Union and the President of the Employer or his designate.
Step 4. In the event the last step fails to settle satisfactorily the complaint, it may be referred to arbitration by either party. . . ."

[4] The lobby departments contained a greater variety of specialty items and involved more complicated food preparation equipment, presenting a different sale format to the public as well (A. 80-82).

Leura Collins was employed by the Respondent in 1961 to work in its Store No. 2; this store was equipped with a lunch department. While working in the lunch department of this and other stores similarly equipped, she received a free lunch for each day on which she worked (Pet. App. 17A; A. 30-31, 38-39). During October, 1970, however, Collins was transferred to one of the Respondent's new stores: Store No. 98, which contained a lobby department. No free lunches were provided for employees working in these lobby departments (Pet. App. 17A; A. 30, 39, 83-84; Respondent's Exhibit No. 2(b), A. 84). Unknown to representatives of the Respondent, Collins and other employees employed in the lobby department of Store No. 98 were availing themselves of free lunches each day, in derogation of the policy to the contrary[5] (Pet. App. 17A; A. 70, 72-73, 75).

In June of 1972, Don Hardy, Loss Prevention Specialist for the Respondent,[6] was assigned by his supervisor, Hal

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[5] Respondent introduced evidence to the effect that prior to opening of a new store, a management official conducts an indoctrination course for the employees of each department, at which it is his duty to inform employees of the provisions of the Respondent's manual which provides that employees purchase such items as milk and cookies for lunch while off the clock and that such items must be consumed in designated lunch areas, with the purchase receipts retained by the employees. Collins testified that she did not attend such a meeting, and no evidence was introduced that such provision in the Respondent's manual was brought to her attention (Pet. App. 17A-18A).

[6] The Respondent employs persons classified as "Loss Prevention Specialists," to guard against losses due to dishonesty (Pet. App. 16A). Hardy, who had three years' prior experience in loss prevention activities with a related retail grocery company, had no supervisory status, had no authority to discharge any employee, and had no authority to make recommendations concerning discipline. He carried no sidearm, was not connected with any constituted authority of law enforcement, and was operating under instructions to terminate any investigation or interview if the subject demanded it (A. 50-52).

Burnett, to observe activities of Collins in the lobby department of Store No. 98 (Pet. App. 18A; A. 53).

After receiving instructions to investigate a complaint that Collins was taking money from the cash register, Hardy spent approximately two days observing activities in the lobby department, but did not notice anything to indicate dishonesty on the part of anyone. Following his observations, Hardy introduced himself to the Store Manager, Joe York, who related to Hardy that one of Collins' fellow employees, Jewell Moody, had told York that she had observed Collins purchasing a box of chicken which sold for $2.98 for which Collins had only paid $1.00 (Pet. App. 18A; A. 53-54, 68-69).

Hardy and York, after lunch, requested Moody to come to an area of the second floor in the employees' lounge.[7] Moody repeated her observations of the previous day regarding Collins and returned to work; York then requested Collins to come to the same location (Pet. App. 18A; A. 53-54, 68-69).

Before Collins came upstairs, Hardy and York moved away from York's desk toward the center of the area used primarily as the employee's lounge. When she arrived no other employees were in the area, and she was introduced to Hardy as a representative of the Respondent's security office (Pet. App. 18A-19A; A. 54-55). After he introduced Hardy to Collins and indicated to her that Hardy wanted to talk to her about some matters, York remained as a witness (Pet. App. 18A-19A; A. 55, 69).[8]

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[7] The employees' lounge was located above the store in an open, non-partitioned area (A. 54, 68).

[8] Joe York is a supervisor within the meaning of the Act but had no authority over the discipline of employees in cases involving theft (A. 74).

Hardy began questioning Collins to determine if she had purchased chicken from the Store on the previous day, and she replied that she had. He made inquiry if she had paid full price for the chicken; Collins replied that she had received a dollar's worth of chicken and paid Jewell Moody for it (Pet. App. 19A; A. 33-34, 56-57, 69). Mrs. Collins then stated, "Shouldn't the Union be in on this?" (A. 56, 70). York replied that it was a private matter between the Respondent and Collins and that he believed it would be better to keep the matter between only the three of them because they were "just trying, you know, asking questions and maybe clear up the matter." (A. 56, 59-60, 70).

In response to questioning by Hardy, Collins explained that she purchased chicken valued at a dollar but because the store was out of small size boxes, the chicken was placed into a larger box normally used when a greater quantity was purchased (Pet. App. 19A; 56-58). Further, Hardy asked Collins if she had ever taken any money from the cash register or placed money from the sale of an item into her pocket rather than into the cash register; Collins denied that she had ever done so (A. 62-63). Following Collins' reply concerning these questions, Hardy left the interview to question Moody concerning the inventory of smaller size boxes. Upon confirmation of Collins' statements, Hardy returned to the employees' lunch room area and advised Collins of the verification and that the inquiry was closed (Pet. App. 19A; A. 56, 69-70).

Collins, after receiving Hardy's assurances that the matter was concluded, became emotional and declared that she had never taken anything from the Respondent without paying for it except for the free lunches she was receiving in the lobby department (Pet. App. 20A; A. 35, 57, 70). Hardy then questioned York if it was true that employees

in the lobby department received free lunches, and York replied that under the Respondent's policy they did not. Both Hardy and York expressed their surprise that employees were receiving free lunches and questioned Collins about the practice, the frequency with which she got such lunches, the types of food that she had received, and the approximate dollar amount of such lunches (Pet. App. 20A; A. 34-35, 57, 71).

Hardy began to prepare a statement, but upon Collins' firm insistence that free lunches were legitimate, he telephoned his supervisor, asking him to determine if employees were permitted to receive free lunches. While Hardy was on the telephone, Collins asked York, "Couldn't I have Billy Brockett [the Union Steward] present?" York then replied, "Well, Leura, you know, it's still basically a private conversation between us, and we are just trying to clear up some matters." (A. 57-58, 71-73).[9]

Returning from the telephone conversation, Hardy continued to question Collins about the frequency of lunches. She informed York that she would not sign any statement. Meanwhile, Hardy received a telephone message from

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[9] The Decision and Findings of the Administrative Law Judge, pertinent to this part, were as follows:

> "Both Hardy and York testified that Collins did not ask for Union representation during the questioning, but only asked shouldn't someone from the Union be here, and that had she in fact requested such representation during the questioning, the interrogation would have been promptly terminated. I do not regard this as a conflict in testimony. Even assuming that Collins used the words Hardy and York attributed to her, while perhaps not quite as articulately expressed as by one more fluent in the English language, it was in her way of expressing herself, a request that a representative of the Union be present during her interrogation, and York's reply that he did not regard this as necessary was legitimately understood by her to be a denial of her request." (Pet. App. 20A).

Burnett to the effect that he had been unable to ascertain what the practice was at Store No. 98, but that in some stores employees received free lunches and in others they did not (Pet. App. 21A; A. 58, 72).

Hardy did not ask Collins to sign any statement and had not finished typing the document when he removed it from the typewriter (A. 59).[10]

Hardy and York thanked Collins for her time during the interview and asked her if she desired to take the rest of the day off, and she replied that she did. York allowed Collins to take off the remainder of the day, and Collins received four hours time for the afternoon. At the conclusion of the interview, York again stated to Collins that he considered the matter to be confidential between her and the Respondent and that no one would know about the interview unless Collins advised them (Pet. App. 21A; A. 59).

II. The Board's Conclusion and Order

Before the full Board, the decision and order of the Administrative Law Judge that a violation of Section 8(a)(1) had occurred was affirmed, with members Kennedy and Penello dissenting.[11]

Thus, the Board adopted the proposed order of the Administrative Law Judge that the Respondent cease and

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[10] Hardy followed his practice of preparing statements of persons interviewed regardless of whether or not they were being interviewed concerning their guilt or innocence in a particular investigation (A. 63-64).

[11] Member Penello voted to dismiss the Section 8(a)(1) allegation because the Respondent was conducting an investigatory rather than a disciplinary investigation, citing *Western Electric Co., Hawthorne Works*, 198 NLRB No. 82 and *National Can Corp.*, 200 NLRB No. 156 (Pet. App. 10A).

desist from requiring any employee to take part in an interview without union representation, where such representation had been requested by the employee and where the employee had reasonable ground to believe that the matters to be discussed may result in disciplinary action (Pet. App. 28A). The Board's decision followed its prior decisions in *Mobil Oil Corp.*, 196 NLRB 1052, *enforcement denied,* 482 F.2d 842 (7th Cir. 1973), and *Quality Mfg. Co.,* 195 NLRB 197, *enforcement denied,* 481 F.2d 1018 (4th Cir. 1973), *certiorari granted* April 29, 1974, No. 73-765 (A. 101).

III. The Decision of the Court of Appeals

The court of appeals for the Fifth Circuit denied enforcement of the Board's order, although concluding that Collins adequately raised the question of union representation. The court of appeals found that there had been no suggestion that the meeting was anything other than a preliminary fact-finding interview, and there was no evidence that the Respondent sought to deal with Collins about the consequences of her alleged misconduct (Pet. App. 5A). The court observed that, in addition to the Board's own precedent, its earlier decision of *Texaco, Inc., Houston Producing Division* v. *NLRB,* 408 F.2d 142 (1969), wherein the court found no statutory requirement for union representation at an investigative interview, was binding precedent. The court, in addition to adopting language from the Fourth Circuit Court of Appeals in *Quality, supra,* declared:

> "While a basic purpose of Section 7 is to allow employees to engage in concerted activities for their mutual aid and protection, such a need does not arise at an investigatory interview. To extend the scope of the Act's protection to such preliminary contacts be-

tween an employee and his employer would be to apply an overbroad interpretation to Section 7. We follow the Seventh Circuit's decision in *Mobil, supra,* but we find it unnecessary at this time to approve or disapprove that portion of the opinion . . . which placed great emphasis on the economic pressure function of Section 7. We believe that an investigatory interview would be a premature stage at which to invoke a requirement of union representation in the absence of some showing that the purpose of the interview was not merely to elicit facts concerning employee conduct but to impose disciplinary measures upon the employee so that grievance hearings later on would merely put the seal on the employer's prejudgment." (Pet. App. 7A).

SUMMARY OF ARGUMENT

I.

The decision of the court of appeals should be affirmed because it properly construes the purpose and scope of the Act.

Legislative history evidences an attempt to balance bargaining relationships through the avenues of economic pressure, and collective bargaining rights are the subject of the main theme of the Act. Legitimate expressions of business concern by employers cannot be characterized as violations of the Act by mere Board edict but must fall within the specified prohibitions of the Act, as illuminated by legislative history and judicial interpretation.

No clear legislative basis has been raised to justify the claimed statutory right of an employee to insist upon union representation at an investigatory interview, even where disciplinary action may result. The Board has not been granted blanket authority to prohibit labor practices that in its opinion are deemed to be unfair or unwise.

II.

Economic factors in industrial life are present to permit the creation of the right to representation for employees in investigative interviews within the well-established bargaining relationships which the Act now protects.

The right sought to be asserted is commonly guaranteed in collective bargaining agreements, negotiated in the environment of economic action, and the use of investigatory interviews without requested union representation has been determined by arbitrators to be within employers' legitimate interests.

The claimed statutory right of participation by union representatives in investigatory interviews should not be founded upon speculative industrial enrichment or wisdom, regardless of how sincere the efforts for such improvement may be.

III.

The vague and often-times ambivalent positions of the Board in defining the limits of proper interviews by employers is further obscured by its present theory. Its previous distinction between disciplinary and investigatory interviews, regardless how arbitrary, provided security and a degree of exactness for employers in the evaluation of the conduct under the Act.

The *ad hoc* reversal of its prior precedents without legislative or judicial support warrants the conclusion that the Board's current argument is without sound statutory support. The Board's decision recharacterizes the purpose and scope of fact-finding, investigatory interviews to cause them, in narrow circumstances, to be violative of the Act on an unexplained statutory basis.

IV.

The Board leaves no reliable standards for employees and employers to avoid engaging in unlawful conduct under its current reasoning.

It causes all concerned to act at their peril and to await subsequent administrative examination of the quality and sufficiency of the employee's apprehension of possible adverse employment consequences which might result from an investigatory inquiry should requested union representation be denied.

ARGUMENT

I. THE ACT DOES NOT CREATE THE RIGHT OF AN EMPLOYEE TO DEMAND THE PRESENCE OF HIS UNION REPRESENTATIVE AT AN INVESTIGATORY INTERVIEW EVEN WHERE THE EMPLOYEE REASONABLY BELIEVES THAT THE INTERVIEW MAY RESULT IN DISCIPLINARY ACTION.

The Board has failed to articulate the statutory basis or the perceptive legislative history which underpins its reliance upon Section 7's alleged confirmation of the right of an employee to union representation at an investigative interview in which the employee reasonably believes may result in disciplinary action. Conspicuously void of any historical, legislative, or judicial precedent, the Board's present theory is precariously fashioned.

History indicates that Section 7 of the National Labor Relations Act was not novel in its enactment.[12]

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[12] Similar declarations, designed to establish and protect the basic rights incidental to the practice of collective bargaining set forth in Section 7, are found in the Railway Labor Act of 1926 (44 Stat. 577, 45 U.S.C. § 152); Norris-LaGuardia Act (47 Stat.

One of the central purposes of the National Labor Relations Act, like that of the Wagner Act,[13] was to counterbalance the economic power of employers by facilitating the use of strikes and other forms of economic pressure by employees.

That the purpose of the Act was to create equality of bargaining power between employers and employees by protecting the exercise of employees' full freedom of association and designation of representatives of their

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70, 29 U.S.C. § 102), and the Bankruptcy Act, as amended, (47 Stat. 1481, 11 U.S.C. § 205(p) and (q)).

Section 2 of the Railway Labor Act of 1934 (48 Stat. 1185) provides:

> "The purposes of the Act are . . . (3) to provide for the complete independence of carriers and of employees in the matter of self-organization . . . Employees shall have the right to organize and bargain collectively through representatives of their own choosing . . . No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice. . . ."

Also, Section 7(a) of the National Industrial Recovery Act (48 Stat. 198, 15 U.S.C. § 707(a)), provides that —

> "Employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from interference, restraint, or coercion of employers of labor or their agents in the designation of such representatives or in self-organization, or in any other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

Section 7 of the Wagner Act (49 Stat. 449) reads —

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ."

[13] "The Wagner Act became law on the flood tide of belief that the conflicting interest of management and worker can be adjusted only by private negotiations, but, if necessary, by economic weapons, without the intervention of law." *Cox, The Right to Engage in Concerted Activities*, 26 Ind. L.J. 319, 322 (1951), See H. Rep. No. 1147, 74th Cong., 1st Sess. 1935); 78th Cong. Rec. 3443 (1934) (Remarks of Senator Wagner).

own choosing is universally accepted. A worker is accorded the right to associate with fellow workers and to join or refrain from joining any labor organization. His helplessness as an individual in the arena of bargaining with his employer for improvements in terms and conditions of employment is recognized. Section 7 seeks to balance the bargaining power of employers and employees by permitting employees to pool their strength.[14]

. The Act endeavors to redress this disparate condition in bargaining relationships, but not every employment contract between an employer and an employee was contemplated or intended to be so adjusted.

As the court stated in *Mobil Oil Corp.* v. *NLRB,* 482 F.2d 842 (7th Cir. 1973):

> "The 'central purpose' of the National Labor Relations Act 'was to protect employee self-organization and the process of collective bargaining from disruptive interferences by employees.' *American Shipbuilding Co.* v. *NLRB,* 380 U.S. 300, 317. The basic thrust of § 7 is to enable employees to organize and to apply economic pressure against their employers in appropriate situations. Scholarly analyses of the reach of § 7 devote almost no attention to the language of the section, but instead consider the various situations in which the use of economic pressure by employees is appropriate. In our opinion, economic pressure may properly be applied to compel employers to follow acceptable investigatory procedures, or to determine the consequences of various kinds of misconduct, but economic pressure should not be a component of the fact-finding process itself. The requested Union representation at an investigatory interview is clearly not

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[14] 79 Cong. Rec. 2332, Feb. 20, 1935.

the kind of 'concerted activity' with which § 7 is primarily concerned."[15]

Section 7 of the Act protects the legitimate and legal use of economic pressure by both organized and unorganized employees, and the scheme of the Statute acknowledges the stress which exists "between the policy forbidding an employer to discipline employees for using economic pressure and the policy permitting him to defend his own economic interests."[16]

No controversy exists in this case about the doctrine which declares that the Statute entitles an employee to union representation after the imposition of discipline, but it is said that the analogy is comfortably extended to pre-decisional, investigatory interviews where the employer seeks to interview an employee prior to a determination concerning possible discipline. This extension must rest upon sound statutory ground and not logical artifice.

The Board's decision in *Quality, supra,* admittedly rests solely upon its interpretation of Section 7 of the Act.[17]

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[15] Citing *Getman, Protection of Economic Pressure by § 7 of the National Labor Relations Act,* 115 U. of Pa. L. Rev. 1195 (1967); and *B. Meltzer, Labor Law: Cases, Materials, and Problems,* 892 (1970).

[16] *Getman, supra,* p. 1196 (1967).

[17] The Board's reasoning is manifested in sweeping generalities:

> "After reflection, we have concluded that it is a serious violation of an employee's individual right to be represented by his union if he can only request or insist on such representation under penalty of disciplinary action. And while the employer's denial of such a request may not derrogate the bargaining rights of the union, in violation of Section 8(a)(5), in the case of a purely investigatory interview, this is not to say eithe. (a) that the employer may discipline the employee for demanding representation; or (b) that the employer may insist, by threatening to discipline the employee's representative, that the interview be held without his presence." (195 NLRB at p. 198).

It is argued that the only course consistent with all the provisions of the Act dictates that participation in the investigative interview must be voluntary; and, if the employee has reasonable ground to fear that the interview will adversely affect his continued employment, or even his working conditions, he may choose to forego it unless he is afforded the safeguard of his representative's presence.[18] This proposal of advocacy is a tortured rendition of the Act's design, for all admit that no collective bargaining occurs in the pure investigative interview.

The significance of Section 7 in a context of the investigative interview has been clearly difficult to define heretofore. The legislative history is not particularly helpful to the Board's newly declared position, as is tacitly conceded by the Board by its omission of reference in its brief. The Board's attempt at statutory reliance has been met with judicial coolness.[19]

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[18] *Quality, supra,* 195 NLRB at p. 198.

[19] The "mutual aid or protection" language of Section 7 of the Act received comment from the court in *Mobil Oil Corp., supra,* in footnote 10:

> "The 'mutual aid or protection' language of § 7, 49 Stat. 452, appeared earlier in § 2 of the Norris-LaGuardia Act, 47 Stat. 70, and § 7(a) of the National Industrial Recovery Act, 48 Stat. 198. The same language is also used in § 1 of the National Labor Relations Act, 49 Stat. 449-450, 29 U.S.C. § 151.
>
> "Perhaps due to its earlier usage, the legislative history of the Act reveals no particular concern for the language. Rather, § 7 is spoken of generally: 'The language restrains employer from attempting by interference or coercion to impair the exercise of employees of rights which are admitted everywhere to be the basis of industrial no less than political democracy. A worker in the field of industry, like a citizen in the field of government, ought to be free to form or join organizations, to designate representatives, and to engage in concerted activities.' S. Rep. No. 1184, 73rd Cong., 2d Sess. 4. In introducing his bill, Senator Wagner also spoke in broad terms: 'The national labor relations bill which

Sound application of legislative intent of the Act warrants the conclusion that the Act accomplishes its purpose by preserving basic individual rights concomitant with the collective bargaining relationship and not by cloaking employees with the right to control employer's avenues of gathering information regarding their operations.

II. ACKNOWLEDGMENT OF AN EMPLOYER'S RIGHT TO CONDUCT AN INVESTIGATORY INTERVIEW WITHOUT THE PRESENCE OF A UNION REPRESENTATIVE IS NOT INCONSISTENT WITH INDUSTRIAL CONDITIONS.

Merely because the right to representation at the grievance stage of personnel actions is protected by the Act and the right to union representation at a pre-decisional interview may be guaranteed by contract does not dictate that it is also statutorily conferred. That the right to union representation at an investigative interview is commonly guaranteed by collective-bargaining agreements supports the position that the Act protects the collective economic pressure to secure the right and not the right in iself.

I now propose is novel neither in philosophy nor in content. It creates no new substantive rights. It merely provides that the employees, if they desire to do so, shall be free to organize for their mutual protection or benefit . . . it seeks merely to make the worker a free man in the economic as well as political field. Certainly the preservation of long-recognized fundamental rights is the only basis for frank and friendly relations in industry.' 79 Cong. Rec. 2368. And, the committee report on the bill discussed §§ 7 and 8 together: 'These sections are designated to establish and protect the basic rights incident to the practice of collective bargaining . . . Neither the National Labor Relations Board nor the courts are given any blanket authority to prohibit whatever labor practices that in their judgment are deemed to be unfair.' S. Rep. No. 573, 74th Cong., 1st Sess. 8."

All agree that many collective-bargaining agreements accord the right of union representation to employees at investigatory interviews whether such interviews are likely to lead to discipline or not. (Board's Brief p. 19).

It is overreaching to conclude, however, that the weight of arbitral authority sustains the right of such representation where contract language is silent even though the employee who is called in for the interrogation may have a reasonable belief that the interview will result in the development of information to be used against him as the basis for discipline. *South Central Bell Tel. Co.*, 59 LA 134, 138 (1972).[20] The conditions of industrial life, acknowledged by arbitrators, admit that the use of employee interviews in the administration of industrial discipline for on-the-job misconduct, production, and order is within the employer's legitimate interest.

The right of participation by union representatives in investigatory interviews at an employee's request cannot rest upon the conjectured benefit or detriment to the employer's interest or the employee's collective bargaining rights. The benefits which may accrue to an employee and the disadvantages to the employer by such practice are purely theoretical and the subject of diverse opinion.[21]

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[20] *Accord: Masonite Corp.*, 54 LA 633, 639 (1970); *Bethlehem Steel Corp.*, 55 LA 994, 995 (1970); *Naval Air Rework Facility*, 54 LA 307, 310 (1969); *Proto Tool Co.*, 46 LA 486, 490 (1966); *Bethlehem Steel Corp.*, 47 LA 1082, 1083 (1966); *Independent Lock Co. of Alabama*, 30 LA 744, 747 (1958); *E. I. DuPont de Nemours & Co.*, 29 LA 646, 652 (1957); and *United Airlines*, 28 LA 179, 180 (1956). Also, *American Can Co.*, 57 LA 1063, 1065 (1971).

[21] Comment, *Union Presence in Disciplinary Meetings*, 41 U. of Chi. L. Rev. 329, 342-344 (1974). *Brodie, Union Representation and the Disciplinary Interview*, 15 B.C. Ind. Comm. L. Rev. 1, 11, 13-15 (1973). There is a belief among some management people that lower level union representation impedes, rather than helps, the settlement of grievances. *B. Crane & R. Hoffman, Successful Handling of Labor Grievances*, 14 (1956).

While it is argued that for a number of years the Board did not recognize the so-called "right of representation," it is evident that the right to act collectively and bargain for such union representation was not deluded by the Board's ambivalent positions. Since the basic thrust of the Act was to equalize the bargaining strength of the employer and his employees, the context of collective-bargaining for the securing of such a right of representation is the proper framework in which the right may be negotiated for between the parties.

The complexities of industrial life support the contention that it is certainly speculative that such a right of representation would insure either the full, truthful version of any occurrence, the presentation of an understandable story, less serious disciplinary action, or guard against overreaching management decisions. It may be stated, moreover, that the presence of union representation may have a detrimental effect upon a genuine fact-finding process, especially where employees are questioned concerning their fellow employees' involvement in questionable conduct.

The nature of an investigative interview does not permit a single, simple generalization as to the beneficial or detrimental effects of conferring the right of union representation upon employees who may request it. The purpose of the interview may vary, the individuals being interviewed may differ, and a variety of incidents may give rise to such an interview.

Regardless of how noble the considerations involved in arguing that such representation is industrially wise, the announcement of the right to representation at an investigatory interview must be founded upon the Statute's language. To do otherwise would attack the firm foundation upon which labor relations are anchored.

III. THE ARGUMENTS ASSERTED TO SUPPORT A STATUTORY RIGHT OF AN EMPLOYEE TO REFUSE TO BE INTERVIEWED AT AN INVESTIGATORY INTERVIEW WITHOUT UNION REPRESENTATION WHERE THE RISK OF DISCIPLINE MAY RESULT ARE LACKING IN MERITS.

The question concerning the existence of a statutory right of an employee to have union representation at an investigative interview is neither novel nor exclusive to this case. What is novel, however, is the Board's present rearranging of employer-employee relations by its "considered" opinion that a statutory right does exist in particular cases.

In *Ross Gear & Tool Co.*, 63 NLRB 1012, 1034 (1945), *enforcement denied,* 158 F.2d 604, 611-614 (7th Cir. 1947), the Board concluded that the employer violated Section 7 of the Act by denying an employee the right to have her union representative present and by discharging her for refusing to come to an investigatory interview alone.[22] The court of appeals denied enforcement, stating:

> "Assuming that an employee has a right to be represented by the union in a discussion or a presentation of a labor grievance with an employer, such a right

[22] Although the Board cited no legislative history or prior precedent, it declared:

> "Assuming, without deciding, that an individual employee is entitled to insist upon union representation whenever he or she may be called in by management to be admonished, in the instant case Ford was being called in partly as a member of a union committee about a matter concerning which the respondent had already dealt with that committee as the exclusive bargaining representative . . . Therefore, Strecker's [the employer] order, directing Ford to come along on penalty of discharge, interfered with, restrained, and coerced Ford in the exercise of the rights guaranteed in Section 7 of the Act and hence was unlawful." (63 NLRB at p. 1033-1034).

did not exist in the instant case. This is so, in our view of the matter, because there is no basis for the contention that such a grievance was involved."

Prior to the Board's next pronouncement that an employer's refusal to permit union representation for an employee during a discharge conversation was not violative of the Act,[23] the General Counsel of the Board refused to issue complaints against employers for refusing to recognize the right of representation of employees prior to the issuance of discipline.[24]

Adopting a broader view, the Board found a violation of Section 8(a)(1) of the Act where an employer refused union representation to an employee and where the Board found that the purpose of the meeting was not solely to provide information but rather to conclude a case of evidence already known. The employer was ordered to cease and desist from refusing "any employee . . . [the right] to be represented by such labor organization at any meeting convened by the employer by which the employee is questioned about . . . [his activities] where such employee

[23] *Dobbs Houses, Inc.*, 145 NLRB 1565, 1570-1571 (1964), where the Board adopted the findings of a Trial Examiner who held:

"I failed to perceive anything in the Act which obliges an employer to permit the presence of a representative of the bargaining agent in every situation where an employer is compelled to admonish or otherwise take disciplinary action against an employee, particularly in those situations where the employee's conduct is unrelated to any legitimate union or concerted activity. An employer undoubtedly has the right to maintain day-to-day discipline in the plant or on the working premises and it seems to me that only exceptional circumstances should warrant any interference with this right. . . ."

[24] *Administrative Rulings of the NLRB General Counsel*, 37 LRRM 1076 (Case No. K-71) Oct. 10, 1955 and *Administrative Decision of the NLRB General Counsel*, 1962 CCH NLRB ¶ 11,991 (Case No. SR2382) Dec. 7, 1962.

requests representation at the meeting by said labor organization."[25]

Ten short days later, the Board issued a decision which adopted a Trial Examiner's dismissal of Section 8(a)(1) allegations raised by the Counsel for the General Counsel that the right to representation by a union at a fact-finding meeting was proper because there was an "inchoate" grievance and the lack of union presence offended the statute.[26]

The Board has previously recognized that an employee's right to union representation does not apply to pre-decisional meetings held essentially to gather information where the potential discipline is "too remote."[27]

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[25] *Texaco, Inc., Houston Producing Div.*, 168 NLRB 361, 363, (1967), enfd denied 408 F.2d 142 (1969).

[26] The Trial Examiner noted in his decision —

> "He [General Counsel] further contends that it is a violation of Section 8(a)(1) for an employer to deprive employees of the advice and counsel of a union representative whenever the *possibility* of disciplinary action may be visited upon them. Translating this thesis into their applicability to the instant proceedings, the General Counsel argues that the employees here involved possess the right to union representation at the April 4 factfinding meetings because an 'inchoate' grievance was in the making. . . .
>
> "To be sure, Section 7 of the Act guarantees employees the right to be represented by their collective-bargaining representative in all areas pertaining to their terms and conditions of employment, and the penalty of suspension from work for alleged insubordination most assuredly is encompassed within those terms and conditions . . . But this is not to say that a bargaining agent must be privy to management councils or that represented employees must be shielded by that agent from company inquiries, on each and every occasion when management embarks upon an investigation to ascertain whether plant discipline has been breached." *Chevron Oil Co.*, 168 NLRB 574, 578 (1967).

[27] *Jacobe-Pearson Ford, Inc.*, 172 NLRB 84 (1968). *Illinois Bell Tel. Co.*, 192 NLRB 834 (1971), where the Board affirmed the following decision by the Trial Examiner:

> "Although the Union, in its brief, makes an appealing argument that the right of union representation should be afforded even in the investigatory stage in those cases involving misconduct which could result in criminal prosecution, I find no basis in the authorities above cited for maintaining such a distinction."

Prior to its decision in *Quality, supra,* the Board found no violation of Section 8(a)(1) where an investigatory interview, even though it might have resulted in discipline, did not go beyond the fact-finding stage.[28]

Thus even until 1971, the Board's disciplinary/investigatory dichotomy continued to receive its support.[29]

The same contention made by the General Counsel in *Lafayette Radio Electronics*[30] is made by the Board in the case at bar:

> "But General Counsel argues for a violation on a broader concept than that presented by the fact-finding versus disciplinary concept. According to General Counsel, the employees were in need, and entitled to, union representation, because '. . . the interrogations

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[28] *Emerson Electric Co.,* 185 NLRB 346, 347 (1970); *Dayton Typographical Service, Inc.,* 176 NLRB 357, 361 (1969); *Texaco, Inc., Los Angeles Sales Terminal,* 179 NLRB 976 (1969); *Wald Mfg. Co.,* 176 NLRB 839, 846 (1969) *affirmed on other grounds,* 426 F.2d 1328 (6th Cir. 1970), where the Board approved the decision of the Trial Examiner who declared:

> "The union has a statutory right to be present at the *adjustment* of grievances, but to permit it to insist on attending every routine interview which might culminate in discipline goes beyond the statute and could disrupt personnel practices in a large plant."

[29] *Lafayette Radio Electronics,* 194 NLRB 491, 492 (1971), where Members Fanning, Jenkins, and Kennedy adopted the following language of the Trial Examiner:

> "From the grist of the *Texaco* case and those cases which have considered the issue, the principle appears to have evolved that the right to union representation exists if the purpose of the meeting between the employee and management is disciplinary; but that the union has no right to be present if the purpose of the meeting is fact-finding or investigatory."

[30] The Board has specifically rejected the contentions that the right of representation is analogous to this Court's decision in *Escobedo* v. *State of Illinois,* 378 U.S. 478 and *Miranda* v. *Arizona,* 384 U.S. 436 (1966), and *U.S.* v. *Wade,* 388 U.S. 218 (1967).

> in circumstances here were also reasonably calculated to prejudice any future grievances as to the 'cause' for any subsequently imposed discipline because the interrogations were for the purpose of extracting detrimental admissions or confessions. Accordingly, any such interrogations tend to render futile any future grievances concerning the 'merits' of the employee's case and would virtually restrict any meaningful contentions related to the subject of the measure of discipline." (194 NLRB at p. 494.)

That the Board has permitted the right of union representation to be conditioned and become subject to collective-bargaining agreements further confuses the issue.[31] In *Western Electric* the issue was squarely presented. The respondent admitted that it had regularly and systematically excluded representation, despite requests for such representation both from employees and the union during investigatory interviews which, in a number of cases, resulted in disciplinary action. Sustaining the respondent's motion for summary judgment that such exclusions did not, as a matter of law, transgress the Act, the Board dismissed the allegations that the employer violated Section 8(a)(1) of the Act. In *Western Electric,* grievances were submitted to arbitration on behalf of two employees who were disciplined following an investigation into their alleged misconduct. In both cases the employees were required to submit to investigatory interviews without a union representative being present, and the union grieved over this refusal. An arbitration board, convened under the contract between the union and the company, ruled that employees did have a right under the agreement to the presence of a union representative at disciplinary confer-

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[31] *Western Electric Co.,* 198 NLRB No. 82 (Aug. 1, 1972).

ences but not at investigatory interviews. Members Penello and Kennedy, along with Chairman Miller, constituted a majority of the Board in dismissing the case based upon their decision "paralleling those expressed by Member Kennedy's dissents in *Quality Mfg.* and *Mobil Oil Corp.*" Chairman Miller, joined in dismissing the allegations, but for different reasons, namely: That where collective-bargaining agreements establish channels for the exercise of employee rights, the Board has traditionally refrained from attempting to regulate or interfere with such arrangements so long as they are consistent with the statutory scheme of the Act, viewed as a whole.

This reasoning would seem to warrant the conclusion that contractual language can bar an employee's claimed statutory right to representation at investigatory interviews.

IV. THE CRITERIA ESTABLISHED BY THE BOARD WHICH ACTIVATES THE CLAIMED STATUTORY RIGHT OF REPRESENTATION IS VAGUE AND SUBJECTIVE.

It is stated that the Board's "special function" of reforming its standards on the basis of accumulated experience gives additional validity to the Board's conclusion that the Act protects an employee from compulsory attendance, without union representation, at an investigatory interview where discipline may result. None would declare that the matter before the Court is isolated or new. The Board's novel position realigns and reverses its earlier decisions, claiming a statutory right where none was previously found to exist. This changed position not only does not find

support in precedent or statutory history but also places employers and employees in perilous positions."[32]

A union's position in such an interview is largely undefined. To follow the Board's logic, if a union is permitted to represent the employee as the exclusive bargaining representative, it is logical to assume that the employer must deal through this representative and that any attempts to bypass the union would also be violative of the Statute.

Apparently, employee misgivings must trigger the claimed statutory right, and investigatory interviews are recharacterized as adversary confrontations where employees are placed under a cloud of suspicion. To declare that the statutory right arises only when an employee has reasonable grounds to believe that the interview might result in discipline is even more arbitrary than to declare the right exists at all.

This line of argument leaves serious doubts for both employers and employees. For employers, the proper denial of requested representation rests not upon its intent or purpose but rather upon the state of mind of the questioned employee. For employees, the proper insistence upon

[32] Member Kennedy in his dissent in *Mobil Oil Corp., supra,* on p. 1054, speaks to this matter when he indicated —

> "No explanation is given as to how and at what point in the interview, or before, reasonable grounds for fear came into being. In my view, only by perception of the nature of events after they happened can it be said that Burnett and Smith had 'reasonable grounds' for concern about their continued employment. The Employer certainly was not in a position at the investigatory interview to read employees' minds and determine their mental state. This being so, the conclusion that the Employer is guilty of an unfair labor practice must be based on something other than the Employer's acts and conduct, namely, the state of mind of the employees, a purely subjective consideration."

representation entitled to protection under the Act will be judged by reasonableness of apprehension under the circumstances. A set of qualifying conditions could hardly be more confusing or vague.

No firm footing for conducting investigative employee interviews with assurance of lawfulness remains under the Board's present pronouncement. No clear claimed right of representation can be seized by employees when confronted by his employer's questions.

The Board's position destroys the clear separation between investigatory and disciplinary interviews and seeks to create a claimed right of dubious origin with unclear parameters. To adhere to this argument would leave industrial relations in chaotic shambles.

Attempts to justify the asserted right to representation in investigatory interviews where discipline may result have no support in statutory framework but rely upon speculative industrial benefits. The Act balances bargaining power between employees and employers; it does not prohibit employers seeking information concerning the work activities of their employees even where discipline may result.

No bargaining relationship or disciplinary atmosphere is created in a fact-finding interview, and no need for bargaining representation arises where no accusations arise and where the employee may remain silent in the face of such questioning.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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August, 1974.

STION FILE
SEP 16 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-1363

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

J. WEINGARTEN, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 73-765

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vs.

QUALITY MANUFACTURING COMPANY AND NATIONAL LABOR RELATIONS BOARD.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE.

The Chamber of Commerce of the United States of America respectfully moves, pursuant to Rule 42 of the Rules of this Court for leave to file the attached brief *amicus curiae* in support of the Employer, Quality Manufacturing Company.

This motion is directed only to the *Quality* case. With respect to the case to be heard in tandem with *Quality, National Labor Relations Board* v. *J. Weingarten, Inc.*, both the Solicitor (the Petitioner) and the Employer have consented to the Chamber's participation therein. In the *Quality* case, the Chamber has received the Employer's consent to participate.

Inasmuch as *Weingarten* and *Quality* present a common question, the accompanying brief is directed not only to the *Weingarten* case, pursuant to the received consents, but also is filed in the *Quality* case, contingent upon this Court's granting the Chamber's motion to participate in that proceeding.

The Chamber of Commerce of the United States of America is a federation consisting of a membership of over thirty-seven hundred (3700) state and local chambers of commerce and professional and trade associations, a direct business membership in excess of thirty-eight thousand (38,000), and an underlying membership of approximately five million (5,000,000) business firms and individuals. It is the largest association of business and professional organizations in the United States.

In order to represent its members' view on questions of importance to their vital interests and to render such assistance as it can to courts' deliberations in such areas, the Chamber has frequently participated as *amicus curiae* in a wide range of significant labor relations matters before this Court and Courts of Appeals.*

The instant proceeding, just as the companion *Weingarten* case, is of particular concern to the Chamber's members, as well as to employers generally, since it involves a question of theoretical significance in the administration of the National Labor Relations Act which also has enormous practical importance in employers' ability to manage their businesses efficiently. The rule of law which the Board has applied in this case reflects a view of the content and limits of Section 7 of the Labor Act which is both unprecedented and which constitutes an impingement upon what has been considered a legitimate exercise of management prerogatives. Thus, in de-

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* *E.g., N.L.R.B.* v. *Textron, Inc.*, ... U.S. ...., 85 LRRM 2945 (1974); *Geduldig* v. *Aiello, et al.*, ... U.S. ...., 8 F.E.P. Cases 97 (1974); *Griggs* v. *Duke Power Company*, 401 U.S. 424 (1971); *N.L.R.B.* v. *Granite State Joint Board*, 409 U.S. 213, 34 L. Ed. 2d 422 (1972); *Boy's Markets* v. *Retail Clerks Union*, 398 U.S. 235 (1970); *H. K. Porter Co.* v. *N.L.R.B.* 397 U.S. 99 (1970); *Sears Roebuck and Co.* v. *Carpet Layers, Local 419*, 397 U.S. 655 (1970); *Super Tire Engineering Co., et al.* v. *McCorkle, et al.*, ... U.S. ...., 85 LRRM 2913 (April, 1974); *N.L.R.B.* v. *Mobil Oil Corp.*, 482 F. 2d 842 (1973); *N.L.R.B.* v. *Frank Visceglia and Vincent Visceglia t/a Peddie Buildings*, ... F. 2d ...., 86 LRRM 2541 (CA 3, 1974); *Scott Hudgens* v. *N.L.R..B.*, No. 73-3264 (CA 5, 1973).

termining the extent to which employees may insist upon union representation during private interviews with management, this Court will determine not only the validity of a rule, but the validity of the Board's approach to the interpretation of Section 7. Similarly, the resolution of this question will govern, in an important respect, management's ability to secure the information from its employees which it requires effectively to manage its business. Unlike some other questions of comparable theoretical interest, the issue posed here is one which confronts all employers, regardless of their size or the nature of their businesses, and arises with frequency in the regular course of their managerial responsibilities.

Accordingly, the practical significance of the issue presented here, together with the implications of the Board's interpretation of the statute and the resulting problems which are created in the administration of the Act, impels the Chamber to submit its views for the consideration of this Court.

Inasmuch as the Chamber is filing in support of the Respondent, *Quality*, it does not appear that the Petitioner has been prejudiced by the Chamber's submission of its brief at this time. Indeed, as stated, the Solicitor, the Petitioner in the companion *Weingarten* case, similarly circumstanced with the Petitioner in *Quality*, has expressly given such consent.

WHEREFORE, the Chamber respectfully urges the Court to grant this Motion for leave to file the accompanying *amicus curiae* brief.

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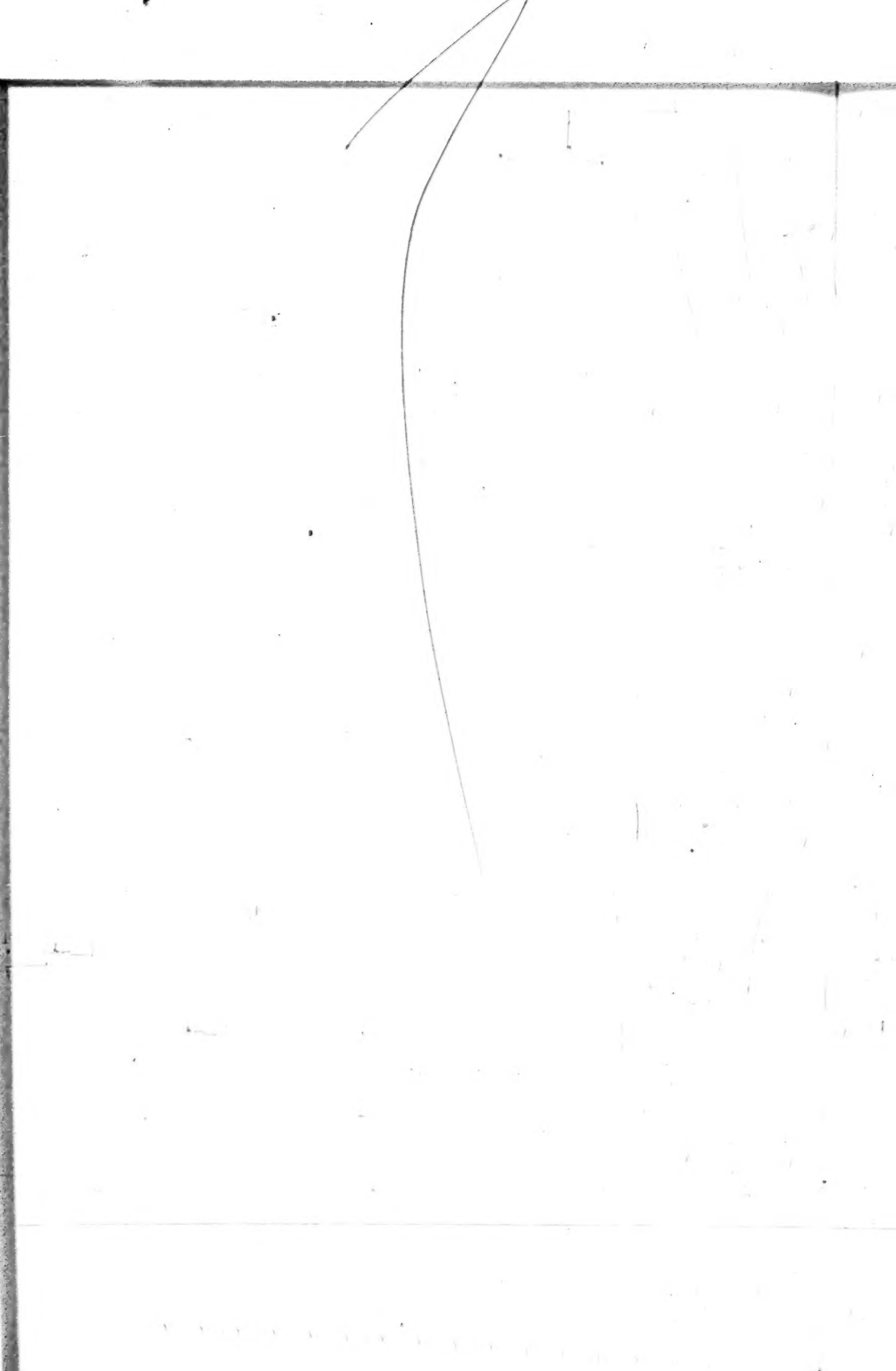

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE.

INTEREST OF THE AMICUS CURIAE.

The interest of the Chamber is set out in the foregoing Motion for leave to file this *amicus curiae* brief.

SUMMARY OF THE ARGUMENT.

These cases present the common issue of whether the National Labor Relations Act requires an employer to permit an employee to have union representation at a fact finding investigatory interview if the employee has reasonable grounds to believe that disciplinary action might result from the employer's investigation. The courts below,[1] reversing holdings by the Labor Board, answered the presented question in the negative. The Chamber contends that the decisions of the courts below should be affirmed by this Court inasmuch as the rule promulgated by the Board's decisions below is illogical, unworkable, and inconsistent with congressional intent and the design and objectives of the Labor Act.

This Court's rationale in *N.L.R.B.* v. *Textron, Inc.*, ... U.S. ....., 85 LRRM 2945 (1974) endorses the Chamber's position. There, this Court held that the Labor Board cannot summarily overturn years of uniform statutory construction, and contrary to congressional intent, read a more restrictive meaning into the Act. Contrary to *Textron's* reasoning, the Board in its *Quality* decision below enunciated a rule governing employees' entitlement to union representation during interviews

1. *N.L.R.B.* v. *Quality Manufacturing Company*, 481 F. 2d 1018 (CA 4, 1973), denying enforcement of 195 NLRB 197; *N.L.R.B.* v. *J. Weingarten, Inc.*, 485 F. 2d 1135 (CA 5, 1973), denying enforcement of 202 NLRB No. 69.

with management which reversed established precedent, contravened congressional intent and the scheme of the Act and imposed new restrictions upon employers. Thus, until its decision in *Quality* below, the Board with court approval had consistently held that the statutory rights of employees did not include the right of union representation in pre-disciplinary investigatory interviews with management. In addition to overturning years of uniform statutory construction, the Board's new rule imposes new and rigorous restrictions upon employers as they attempt to elicit information necessary to maintain efficient operations. The presence of union representatives in fact-finding interviews will frustrate and may well foreclose the flow of information that is required by employers if they are to make reasonable decisions with respect, *inter alia*, to plant security, employee discipline, and work flow.

It is apparent that the Board's long-standing rule concerning the right to representation during investigatory interviews, rather than the rule it enunciated in *Quality* and followed in *Weingarten*, is consonant with the statute's design and with congressional purpose. The former rule had existed since at least 1947. Had Congress believed that the Board's construction of the Act constituted a misconception of congressional intent, it could have effected a correction either in the subsequent Taft-Hartley Amendments or in the Amendments of 1959. Furthermore, the new rule has manifold internal infirmities, which make it unworkable and consequently an unreliable guide to conduct as employers embark upon their many and varied interviews with their employees. It should not be presumed that a rule whose application is fraught with uncertainty is a manifestation of Congress's intent absent legislative expression endorsing such a result. Such a pronouncement is, of course, not here present.

It follows from the foregoing that the Board's new rule must be rejected pursuant to this Court's reasoning in the analogous *Textron* case. The Board below has attempted to accomplish what this Court has proscribed in *Textron:* it has promulgated

a rule which overturned a history of uniform statutory construction, infused new restrictions upon employers as they engage in daily, normal business operations and acted in a manner not contemplated by Congress and contrary to the design of the Act.

Independently, the novel construction of the Act forged by the Board below must be repudiated since it does not involve concerted activity which is recognized and protected by the Act. That is, an employee's request for representation at an investigatory interview involves merely an attempt to secure his personal interest and therefore does not constitute concerted and protected action. Thus, it has been judicially recognized that in order to prove activity is concerted under Section 7, it is necessary to demonstrate that the activity was for the purpose of preparing for group action to correct a grievance or a complaint. During a pre-disciplinary fact finding interview, no management decision affecting an employee's working conditions has transpired, and therefore there has been no determination that could serve as the basis for a grievance. It follows that a request for representation during an investigatory interview is not made to prepare for group action to correct a grievance or complaint. Consequently, such a request is not activity that is recognized to be concerted and protected by the Act.

Furthermore, since under established Board precedents a union has no right to demand that it be present at such interviews, the nature of the interests to be protected at the interview cannot be considered to be collective or concerted. Otherwise, since a union is charged to protect collective interests, an employer would be statutorily compelled to permit its presence.

It is evident from the foregoing that the objectives of the Act will not be served by recognizing the validity of the Board's new rule, and, accordingly, this Court is urged to repudiate it and affirm the decisions of the courts below.

ARGUMENT.

THE BOARD'S RECENTLY ADOPTED RULE ENTITLING EMPLOYEES TO UNION REPRESENTATION DURING INVESTIGATORY INTERVIEWS WITH MANAGEMENT PERSONNEL IS CONTRARY TO THE DESIGN AND OBJECTIVES OF THE ACT.

A. The Board's New Rule Reverses Twenty-five Years of Uniform Precedent and Contravenes Both Congressional Intent and the Rationale of This Court's Textron Decision.

This Court in its *Textron*[2] decision has held explicitly, and the Chamber is contending, that the National Labor Relations Board cannot summarily reverse years of uniform statutory construction and, contrary to Congressional intent, read a new and more restrictive meaning into the Act.

It follows from the rationale underpinning *Textron* that the Board has no warrant to hold, as it did below, that an employer must permit an employee to have union representation during a fact finding, predisciplinary interview whenever the employee thinks he has reasonable ground to fear that disciplinary action may result from the employer's investigation. The holdings by the Board below, analogous to the Board's *Textron* decision, represent a dramatic reversal of years of consistent statutory construction, severely restrict an employer's ability to secure information necessary to conduct his business and contravene Congressional intent.[3]

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2. *N.L.R.B.* v. *Textron, Inc., supra.*

3. As the court below in *Quality* aptly and correctly observed, "never has it been thought, as the Board would hold here [in Quality], that [an employee's statutory rights] require an employer to permit an employee to have a union representative present whenever the employee 'has reasonable ground to fear that the interview will adversely affect his continued employment, or even his working conditions'." 481 F. 2d 1018, at 1024.

From at least the time the Seventh Circuit decided *N. L. R. B.* v. *Ross Gear and Tool Co.*,[4] in January, 1947, until the Board's decision in *Quality* below in January, 1972, the Board had adhered to the proposition that employees were not statutorily entitled to the presence of their union representatives at management interviews held to gather information or investigate facts; employers were held neither to violate Section 8(a)(1) nor 8(a)(5) by refusing to permit the union to be present until after some decision was made which could become subject to the parties' grievance and arbitration machinery.

Thus, in an administrative decision of the General Counsel's office in 1962,[5] the General Counsel refused to issue a Complaint in a situation where an employer prevented a union steward from attending an interview whose purpose was to verify an employee's excuse for his absence from work. According to the General Counsel, the statute created no duty on the employer to permit union attendance at employee interviews until the employer's investigation was completed. While this decision did not come before the Board since no violation of law was found warranting further proceedings, the Board did have an opportunity to confront the issue shortly thereafter in *Chevron Oil Co.*[6] For purposes of the instant proceedings, *Chevron Oil* was a particularly instructive case since the General Counsel had apparently altered his view of the law as expressed in the 1962 administrative decision, and urged upon the Board the contention that an employer violates Section 8(a)(1) of the Act by depriving an employee of union representation at a management interview when there exists a *possibility* of discipline resulting therefrom. The Board rejected the General Counsel's arguments and restated its conviction that the Act conferred no such asserted right during the performance of management's investigatory role. Not only did the Board precisely reject the

4. 158 F. 2d 607 (CA 7, 1947).
5. SR-2382, CCH NLRB Paragraph 11,991 (1962).
6. 168 NLRB 574 (1967).

position there which it now asserts in the cases below, but it did so specifically in the context of an 8(a)(1) charge.

In the instant proceedings the Board, in its brief in *Weingarten* pages 24-26, seeks to distinguish its former contrary decisions, such as *Chevron Oil*, by urging that it merely affirmed decisions of law judges without any "considered analysis" and by asserting that the prior decisions involved the question of unions' rights to be present at employee interviews pursuant to the bargaining rights conferred in Section 8(a)(5), rather than, as here, employees' right to representation as conferred in Section 7 and violated in Section 8(a)(1). The Board's attempt to justify its new rule by "confessing" that for over 25 years it merely rubber-stamped law judges' decisions without analysis is startling on its face. The Board is charged with deciding unfair labor practice controversies arising under the Act. (Section 10(c)). Accordingly, it is presumed that the Board obeys its congressional mandate. Therefore, a summary affirmance of a law judge's decision must necessarily constitute complete agreement with that decision and *its rationale*. If the Board at its whim may deny the precedential value of any decision where it has affirmed a judge's findings without significant comment, a wholesale reevaluation of what may constitute Board precedent will be necessary. This will result in chaos for those involved in the labor-management field and produce a justifiable erosion of public confidence in administrative tribunals. The Board's explanation therefore must fall because it is foreign to our administrative system and to sound labor policy.

In the *Weingarten* case then, the Board's effort to mask the inconsistency of its current position is unavailing. Indeed, the majority of the present Board ignored the teaching of its predecessor which, in *Chevron Oil*, adopted the following conclusion and rationale of the Law Judge:

> "To be sure, *Section 7* of the Act guarantees to employees the right to be represented by their collective bar-

> gaining representative in all areas pertaining to their terms and conditions of employment, and the penalty of suspension from work for alleged insubordination most assuredly is encompassed within those terms and conditions. . . . But this is not to say that a bargaining agent must be privy to management councils, or that represented employees must be shielded by that agent from company inquiries, on each and every occasion when management embarks upon an investigation to ascertain whether plant discipline has been breached. . . . I fail to perceive how the exclusion of Union Steward Kosmyna from those meetings intruded upon the *rights of employees* or affected the Union's representative status. . . . [or how] Respondent evaded *any* statutory obligation by refusing to entertain the presence of a union representative during the discussion of an alleged rule infraction when no definite adverse action has as yet been decided upon by Respondent."[7] (Emphasis added).

In an unbroken line of cases, the Board has adhered to the holding and rationale of *Chevron Oil.* The resulting rule was adopted and followed in *Jacobe Pearson Ford, Inc.*,[8] *Dayton Typographic Service*,[9] *Wald Manufacturing Company*,[10] *Texaco, Inc. Los Angeles Sales Terminal*,[11] *Illinois Bell Telephone*,[12] and *LaFayette Radio Electronics.*[13] In all of these cases the Board rejected claims that *employees* had a statutory entitlement to the presence of union representation during investigatory interviews with management.

In an instance in which the Board held the presence of such representation to be proper, the predicate for that result was the Board's conclusion that the purpose of the interview was not investigatory, but was rather to develop evidence, *following*

7. 168 NLRB at 578.
8. 172 NLRB No. 84 (1968).
9. 176 NLRB 357 (1969).
10. 176 NLRB 839 (1969), aff'd 426 F. 2d 1328 (CA 6 1970).
11. 179 NLRB 976 (1969).
12. 192 NLRB No. 138, 78 LRRM 1109 (1971).
13. 194 NLRB No. 77, 78 LRRM 1693 (1971).

a decision to impose discipline, to support the previously reached determination.[14]

Each of the cases decided after *Chevron Oil* cited that case as governing authority. Each of them, therefore, may be considered to have adopted *Chevron's* determination that *neither* Section 7 nor Section 8(a)(5) constituted statutory warrant for the union's presence during pre-discipline interviews; nothing stated by the Board in any of them suggested any disposition to reach any other conclusion with respect to either the Section 7 or Section 8(a)(5) aspects of the *Chevron* decision.

A particularly instructive case is *LaFayette Radio Electronics, supra.* This case, was decided only six weeks before the Board determined, in *Quality,* to overturn the accepted and long-established rule which was created by the decisions in the series of cases discussed above. In *LaFayette,* the Board adopted the Law Judge's summary of the law as it had been forged during at least the previous twenty-five years:

> ". . . the principle appears to have evolved that the right to union representation exists if the purpose of the meeting between the employee and management is disciplinary; but that the union has no right to be present if the purpose of the meeting is fact finding or investigatory."[15]

It should be noted that the principle thus articulated is framed in terms of the *employee's* "right to union representation" and hence involves an interpretation of the content of Section 7 of the Act; it does not represent, as the Board's attempted distinction between its new and former rule would have it, a focus only

14. *Texaco, Inc., Houston Producing Div.,* 168 NLRB 361 (1967), enf. den. 408 F. 2d 142 (CA 5, 1969), on the ground that employees' right to union representation does not extend to all dealings with the employer which may ultimately affect employment conditions.

15. 194 NLRB 491, 492. It is evident that the Judge considered the principle involved to be based upon Board precedent even though the Board may simply may affirmed previous Law Judges' decisions.

on the *union's* role as bargaining agent under Section 8(a)(5). Similarly of significance in *LaFayette* is the fact that the General Counsel had sought from the Board a ruling granting employees the right to union representation at all interviews with management, whether investigatory or not, from which a decision to effect any discipline might emerge. This effort, which appeared to seek a rule analogous to that of this Court's right-to-counsel rule in *Escobedo* v. *State of Illinois*,[16] was firmly rejected by the Board in favor of the above-quoted then existing and established legal standard.

The foregoing discussion of the evolution of the Board's rules gives rise to two conclusions. First, the Board's former rule concerning employees' right to union representation during investigatory interviews stems at least from the time the Seventh Circuit decided *Ross-Gear & Tool Co.* in early 1947. That decision predated the Taft-Hartley amendments to the Labor Act. Had Congress believed that rule to constitute a misconception of its statutory design, it could have effected a correction either in the subsequent Taft-Hartley amendments or in the amendments of 1959 or at any other time. On the contrary, despite so long a history of uniform application of that rule there is no evidence of Congressional displeasure with it. It would appear fair to conclude, therefore, that the rule fairly expressed Congress' intent.[17]

Second, where an administrative rule of law has become accepted and established over a long period of time, without objection from the legislature body whose enactment gave rise to it, the courts should be reluctant to accept a reversal of that rule in the absence of a change in the statute. The justification of such a reversal should constitute a heavy burden for the administrative body which seeks to impose it. In the instant cases, the Board has offered no explanation for its action. As the court below in *Quality* observed, the Board has failed to articulate reasons for reversing years of uniform statutory interpretation.

16. 378 U. S. 478.

17. In addition, part B advances arguments that demonstrate that the *new* rule is contrary to congressional intent.

If the Board is to enlist judicial approval of its new interpretation of the Act, it must demonstrate by compeling argument that its novel construction is an accurate reflection of Congressional design. The Board's failure to advance such arguments requires the rejection of its new interpretation of the Act.

Furthermore, as demonstrated above, the Board's effort to distinguish between Section 7 and Section 8(a)(5) rights in order to avoid the appearance of conflict is not supported by its own prior decisions. Nor is it rational to accept such a distinction-after-the-fact. If all those employees who were held unentitled to union representation over the past years could have achieved a different legal result merely by arguing their cases differently or relying on a different Section of the same statute, then surely that point would have been made by the Board in some manner in at least one of its prior decisions. That no such observation was made is ample proof that in the instant case the Board is indeed advancing a new and inconsistent interpretation of the statute.

It cannot be doubted that this novel interpretation of the Act will significantly restrict employers in their efforts to ascertain facts necessary to make required management decisions with respect, *inter alia*, to plant security and work rules. As will be discussed in more detail in part D *infra*, the presence of union officials at fact finding interviews will frustrate, if not entirely foreclose, the flow of information that management needs to efficiently operate its business. Thus, similar to its attempt in *Textron*, the Board below has imposed new restrictions upon employers, contrary to congressional intent. In *Textron* the Board had determined that all managerial employees are covered by the Labor Act, except those whose participation in a union would create a conflict of interest with their job responsibilities. This Court, rejecting the Board's holding, reasoned that it conflicted with long-standing Board precedent which had excluded all managerial employees from the Act's coverage. This Court further recognized that the Board's decision diminished management's necessary control over those persons who formulated his policy and clearly contravened

congressional intent. Thus, the effect of the Board's rule below is similar to the result that the Board sought to accomplish in *Textron*. Both below and in *Textron* the Board overturned long-standing precedent, infused new restrictions upon employers as they operated their businesses and contravened congressional intent and the Act's design.

In view of the rationale underlying *Textron* and the arguments urged above and hereinafter, the Board's novel construction of the Act must be rejected.

B. The New Rule Is Illogical and Unworkable.

A fundamental premise of sound legislative construction is that Congress should not be presumed to have intended, or subsequently to approve, a statutory interpretation which is logically and philosophically unsound.[18] The subject rule, as an interpretation by the Board of the latitude of Sections 7 and 8(a)(1) of the Act, is the product of such an interpretation.

This rule,—which provides that an employee who is called in for *any* interview or discussion by management and who requests union representation may not lawfully be denied such representation so long as the employee has reasonable grounds to fear the interview *may* adversely affect his working conditions,—contains serious infirmities.

Initially, a finding that the employer, by denying such a request, has violated the law is a function of what the employee says and what the employee may suspect. Thus, curiously, the employer's violation of law may have nothing whatever to do with what *he* does or believes or intends, with whether his object is anti-union or wholly altruistic. Since what an employee believes to be the employer's intention or desire may bear no relationship to fact,—as, for example, when the employee hears plant rumors which are both untrue and unknown to the employer, a violation of this rule by an employer may

18. *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381.

result from an incorrect belief by the employee in the presence of non-existent intentions all unknown to and unknowable by the violating employer.[19]

Just as this rule focuses on the conduct and attitudes of the wrong persons, it also emphasizes the importance of the wrong variables. For the portion of the rule which makes reference to an employee's "reasonable grounds" to fear an adverse consequence of an interview with management presents its own serious problems. What is objectively "reasonable" has no necessary relationship to reality. The need to determine in every instance of the application of this rule whether a given employee reacted with objective reasonableness to the totality of circumstances surrounding his situation will inevitably involve inquiry into the private and hence subjective views of each employee. What is "reasonable" to any given individual depends not only on his knowledge and assessment of external circumstances, but also on his knowledge of his personal situation and the relationship of the one to the other. Thus, for example, whether an employee has a reasonable basis to fear discipline as a result of interviews concerning damage to company property must depend both upon the employee's awarness of the existence of damage and of his own responsibility or participation. Neither the employer nor the Board can really be sure of the employee's basis for reasonable fear in the absence of his confession of guilt. On what basis, therefore, is the employer to judge whether he must, under the rule, permit union representation? If the mere fact that an interview is to be conducted on a matter warranting discipline is sufficient to cause reasonable fear on the part of anyone interviewed, then the rule's focus

19. Of course, the employer may obviate his own difficulties with this rule by ceasing to hold any employee interviews at all or by permitting the union to be present at all times, thus forsaking either the benefits to be derived from such meetings or an important aspect of management's right effectively and, where necessary, confidentially to run its own administrative affairs in a non-discriminatory manner. A purpose to compel such a choice should not easily be attributed to Congress.

on the concept of reasonable fear is a superfluity; the rule, in that case, should merely require union representation at all interviews. The Board does not go that far, of course, and thus creates an impossible dilemma: the mere fact of the interview alone does not give rise to an objective and reasonable fear of adverse consequences, and the extent to which the employee has a genuine basis for fear, through discovery of his own culpability, cannot be known by the employer prior to the interview. However, it is frequently at that time that he must make his decision whether to allow union representation. Thus, at least as a general proposition, the rule cannot be rationally applied on its own terms.

Indeed, the difficulty in applying it under any circumstances can be demonstrated from an example cited by the Board itself, in its *Quality* decision below, as an illustration of a clear case when an employee would have no basis for seeking union representation. The Board majority suggests that an interview for the purpose of giving an employee "needed corrections of work techniques" would not tend to produce a reasonable fear of adverse consequences and the Board would not, therefore, require an employer to permit union representation. However, there are several problems inherent in this illustration. First, the Board's rule does not appear to require the employer to disclose the precise purpose of the interview in advance, so that an employee called to an interview may have no basis for knowing how "fearful" he should be of its consequences. May he compel the employer to state the exact purpose of a requested interview before he agrees to attend? Should he with impunity be allowed to refuse to attend without such disclosure by his employer? If an employee has committed a serious infraction of the plant's work rules and is called by management to an interview whose purpose is not stated to him but, in fact, involves another matter offering no jeopardy whatever, what are his rights? On any objective standard, the employee has reason to fear the consequences of the interview whereas the employer,

having read the Board's *Quality* decision, knows that the Board believes there to be "no reasonable basis for [the employee] to seek the assistance of his representative" in the interview which the employer wishes to conduct. And, finally, it is submitted that reasonable men can differ even with respect to the substance of the illustration the Board majority cites as being clear. For it appears to the *amicus curiae* that even were an employee to be informed prior to a requested interview that its purpose was to correct his work techniques, he might well have justifiable fear that the poor work performance which gave rise to the need for the interview might also result in a transfer to another job or another shift or to a probationary status pending improvement in his performance. A poor worker interviewed about his poor work techniques may thus have a more substantial basis for a reasonable fear of adverse consequences than another employee who is interviewed about a theft he did not commit, yet the Board would presumably require the requested presence of union representation only in the latter situation.

The Board's decision in *Mobil Oil Corp.*, 196 NLRB No. 144 (1972), enforcement denied 482 F. 2d 842 (CA 7, 1973), raising the same issue as is presented here, illuminates the weaknesses in its new rule. In that case employees Burnett, Smith, Mathews and Hill were interviewed by the same management personnel, for the same purpose, in the same manner and received the same discipline for the same offense. Yet the discharges of the first two were deemed unlawful because they sought representation prior to or during their interviews, while the discharges of the remaining two were considered proper because they made no such request. However, the only employee of the four who was willing to sign a statement was Smith who asserted his innocence throughout. He, presumably, had no basis for fear or appeared to have none insofar as such conduct evidences his state of mind. Yet his discharge was unlawful. Employee Mathews, who refused to sign any such state-

ment but failed to seek the union's presence was considered permissibly discharged, although his conduct would appear to suggest a more substantial basis for fear of discipline by management. The implication of the Board's decision in that case is that establishment of the existence of the required reasonable fear of adverse consequences may reduce simply to whether the employee seeks the union's presence and assistance. The disposition of Smith's case suggests that conclusion. This may well be the only rational way to apply the rule, but it is nonetheless a distortion of the terms of the rule itself. A rule of law whose sensible enforcement involves ignoring some of its own requirements should not be construed to comport with Congress' intent or design.

C. An Employee's Request for Representation at Investigatory Interviews Involves a Personal Interest and Not Protected, Concerted Action.

The National Labor Relations Act protects employees' *concerted* activity. An employee acting for himself and who pursues interests which are personal and not shared by his fellow members of the bargaining unit does not, therefore, engage in conduct which the Act was designed to protect. It is submitted that a request for union representation at an investigatory interview seeks personal protection unallied to a protected group or collective interest.

The body of law traced in the preceding sections of this brief established, at a minimum, that a union as a functioning entity has no right to demand to be present at investigatory interviews of its members; that is, an employer would not violate Section 8(a)(5) of the Act by rejecting the union's demand.[20] Since unions are charged with the duty of representing their members

20. The Board has not quarrelled with this conclusion. Rather, the Board adopts it, arguing that the representational claim involved here stems from employees' rights under Section 7 and not from unions' rights under Section 8(a)(5).

in matters in their collective interest, it appears to follow that in the described line of cases the Board has already determined that union representation at investigatory interviews is not required by any such collective interest; otherwise employers surely would be compelled to permit the union's presence.

In order to justify its findings below, the Board asks this Court to adopt a conceptually untenable position: an employee would be held to have a right to union representation under the language of Section 7, which guarantees him the right to engage in "*concerted* activities for the purposes of *collective* bargaining or other mutual aid or protection", while the union's statutory inability to insist on being present negates the existence of a collective bargaining purpose or concerted activity or any employee effort to secure mutual aid. The Board cannot have it both ways. If the interests or potential jeopardy of an employee at an investigatory interview do not rise to the level which would permit his union representatives to involve themselves in his protection, then, as a matter of logic and statutory design, the employee himself cannot compel the union's representation to protect the very same interests. The extent of the interests to be protected, the need for protection and the nature of the services which the union can provide its members is the same whether the performance of those services is sought to be invoked by the union itself or by an employee whom it represents.

It follows, therefore, that the described representation sought by an employee must constitute an effort to secure an individual or personal employment right which unions do not protect, rather than a concerted one which they do protect. Whatever may be the merit or wisdom in an eventual statutory recognition of such rights in employment situations, it is clear that the Act currently neither recognizes nor protects such alleged rights. Unless Congress moves to confer them by amendment, the Act may not be interpreted to cover them.

Accordingly, during investigatory interviews with management,—a period prior to the engagement of the union's au-

thority to act on behalf of a member's interests,—requests for representation involve unconcerted individual conduct, unprotected by the Act. *Mobil Oil Corporation* v. *N.L.R.B.*, 482 F. 2d 842 (CA 7, 1973); *N.L.R.B.* v. *J. Weingarten, Inc., supra.*

Furthermore, as the Seventh Circuit held, in order to prove concerted activity under Section 7, "it is necessary to demonstrate [at least] that the activity was for the purpose of inducing or preparing for group action to correct a grievance or a complaint. *Indiana Gear Works* v. *N.L.R.B.*, 371 F. 2d 273, 276 (1967). This decision is consonant with the earlier decision in that circuit, *N.L.R.B.* v. *Ross Gear & Tool Co.*, 158 F. 2d 607 (1947). *Ross* held that there is no statutory right to representation at interviews not involving the presentation of a grievance. The Board's decisions in these causes below are clearly inconsistent with *Indiana Gear* and with *Ross*. That is, during a fact finding interview no management decision affecting an employee's working conditions has been made, and therefore there has been no decision that could serve as the basis of a grievance. It follows that a request for representation during an investigatory interview cannot have been made to prepare for group action to *correct* a grievance; the request is accordingly not "concerted activity" as that term has been traditionally used when speaking of employee rights under the Act.[21]

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21. The Petitioner's reliance on *N.L.R.B.* v. *Washington Aluminium* (370 U.S. 9 (1962)) is wholly misplaced. There, the activity—walking off the job—was traditional concerted activity *initially* and, therefore, entitled to the Act's protection. Here, in contrast, the request for representation during investigatory interviews does not involve concerted conduct, and accordingly, cannot be protected by the Act.

Thus, as demonstrated in detail above, an employee's request for representation during an investigatory interview is not designed to prepare for group action to correct a grievance, since no management decision to discipline the employee has been made. Furthermore, since under Board law a union has no right to demand that it be present at a fact finding interview, the nature of the interests to be protected and the need for protection at such an interview is not collective or concerted. Otherwise, since a union is charged with protecting these interests, an employer would be compelled

D. The Board's Newly Adopted Rule Converts a Non-Mandatory Subject of Bargaining Into an Unfair Labor Practice and, Independently, Is Contrary to Sound Policy and the Purposes of the Act.

A principal policy objective of the National Labor Relations Act is to effect a balance between employees' right to act in concert for their mutual protection and employers' right to operate and manage their businesses effectively and without interference.[22] The challenged rule of law which the Board has applied to these cases creates an unnecessary and harmful imbalance between these competing rights because it interferes with employers' ability to secure needed information while according to employees rights which are not required for the furtherance and protection of their legitimate interests.

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by the Act to permit its presence. For these reasons, the request for representation necessarily involves only non-concerted, unprotected conduct and *Washington Aluminium* is therefore inapposite.

Washington Aluminium is not applicable for another and independent reason. In that case there were at issue two separate and distinct duties to the involved employees: a duty to bargain with those employees; a duty not to discipline them. Each of these duties existed independently from the other and each was enforced by a specific section of the Act. Consequently, an employer might breach one of these independent duties but not the other, as in fact occurred in *Washington Aluminium*, and thus violate one statutory provision but not the other.

Here, in contrast, there is at issue only a single duty: whether an employer has a duty to employees to permit them to have union representation during investigatory interviews with management. Whatever the ultimate resolution of the issue in this case, *Washington Aluminium* is not authority for the Petitioner's contentions.

22. *Boys Markets, Inc.* v. *Retail Clerks*, 398 U. S. 235 (1970); *Central Hardware Co.* v. *N. L. R. B.*, 407 U. S. 539 (1972). See also *Allied Chemical & Alkali Workers of America* v. *Pittsburgh Plate Glass Co.*, 404 U. S. 157 (1971), in which this Court stated that managerial judgments which threaten employees' jobs are not necessarily subject to bargaining: "Other considerations, *such as the effect on the employer's freedom to do business*, may be equally important." 30 L. Ed. 2d at 358, n. 19. (Emphasis added.)

The effective, efficient management of a business will frequently require a company to engage in investigatory interviews. Management's opportunity to make reasonable and appropriate decisions with respect to numerous areas of its legitimate concern, whether plant security, formulation and adherence to rules and employee discipline, or problems of work flow, are subject to its right to secure reliable information from employees. Were the availability of that information to be curtailed, a company's ability intelligently to make such decisions would severely be inhibited. Yet the presence of union agents at every investigatory interview from which any employee, however mistakenly, feared some adverse consequence would inevitably result in such a curtailment of information. For the union agent's representation of an employee would likely take the form of a prohibition on giving any information at all; this would be the clearest means for assuring that nothing would be said or revealed of possible harm. Whether the union representative would recommend a total or only partial refusal to cooperate is immaterial. The effect of either course would tend to deprive management of essential data unavailable from any alternative source. Similarly, management frequently requires information from its employees promptly. If each request by management must be preceded by a series of negotiations with the employee and his union as to the nature of the interview, the areas of possible jeopardy and the employee's right to union representation, a form of industrial chaos is invited.

Whereas the consequence of according judicial approval to the rule urged by the Board would surely be to retard the flow of information needed by management to carry out its obligation to run its business efficiently, the protections which would thereby be accorded to employees exceed their reasonable requirements. Where contractual grievance and arbitration provisions exist, the substance of any adverse impact on employees resulting from investigatory interviews becomes subject to full review. It is true, of course, that an employee's right with impunity

to restrict management from obtaining information may result in management's inability to sustain the imposition of discipline and thus obviate employees' need to invoke the grievance-arbitration machinery. While this would likely be one effect of the judicial approval of the position urged by the Board below, not even the Board has contended that Section 7 of the Act should be read to insulate employees from the consequences either of their improper conduct or of any conduct unrelated to union or other statutorily protected activity. It is sufficient protection of an employee's legitimate interests to afford him recourse to his contractual remedies, as earnestly and actively pursued by his collective bargaining representatives.

Where no such contractual protections exist, the provisions of the National Labor Relations Act afford relief and redress from any improper management conduct in connection with investigatory interviews.[23] The Board has established a series of rules protecting employees from management interviews which trench on their statutory rights under Section 7. In addition to the familiar general prohibitions against threats and promises of benefit in connection with employees' collective preference and activity,[24] the Board, in a much litigated area of its jurisdiction, has adopted rules specifically governing the isolated questioning and interviewing of employees.[25] The Board has always

23. Such statutory guarantees also exist where employees are covered by the terms of a collective bargaining agreement. In those circumstances, the further protections contained in the Board's proposed rule are doubly unwarranted.

24. See, e.g., *N. L. R. B.* v. *Exchange Parts Co.*, 375 U. S. 405 (1964); *N. L. R. B.* v. *Neuhoff Bros.*, 376 F. 2d 372 (1967); *N. L. R. B.* v. *Power Equipment Co.*, 313 F. 2d 438 (CA 6, 1963); *General Industries Electronics Co.*, 146 NLRB 1139 (1964).

25. *Essex Wire Corp.*, 188 NLRB No. 59 (1971); *Heck's Inc.*, 172 NLRB No. 255 (1968); *Redcor Corp.*, 166 NLRB 1013 (1967); *Blade-Tribune Publishing Co.*, 161 NLRB 1512 (1966); *General Industries Elec. Co.*, 152 NLRB 1029 (1965); *Montgomery Ward & Co., Inc.*, 146 NLRB 76 (1964); *United Aircraft Corp.* v. *N. L. R. B.*, 440 F. 2d 85 (CA 2, 1971); *Bon-R Reproductions, Inc.* v. *N. L. R. B.*, 309 F. 2d 898 (CA 2, 1962).

focused strongly on the protection of employees' rights, as, for example, in rendering unlawful questioning which places an employee in the position of acting as an informer regarding the protected conduct of his fellow employees.[26]

The foregoing discussion leads to two independent conclusions. First, the Board's challenged rule in actuality properly constitutes a non-mandatory subject of bargaining under the rationale of this Court in *Pittsburgh Plate Glass Co., supra.* This Court there held that unless a subject will "settle an aspect of the relationship between the employer and the employees" and unless its impact on their working conditions is significant and not merely "speculative," the employer is under no duty to bargain and may act unilaterally with respect to that subject. In the instant case, for the reasons cited in *Ross Gear and Tool Co.* and its progeny, no employee interest or right warrants or permits a union's involvement until there exists some decision by management which could serve as the basis for a grievance. The Board itself has taken the view that unions have no role to play, pursuant to the bargaining rights granted them in Section 8(a)(5) of the Act, during investigatory interviews. It follows that if no union response is appropriate, or if such a response is premature, then there is not involved an issue which will "settle an aspect of the [parties'] relationship". When, in addition, there exists only a "speculative" need for the union's involvement, as during investigatory interviews where no decision has been made substantially affecting any employee's working conditions, then there is clearly satisfied the requirements for the existence of a non-mandatory bargaining subject. This is particularly true where, as here, there also exist important management interests requiring unilateral action. It is submitted that if the union's presence during purely investigatory interviews is not a mandatory subject of bargaining, then management's refusal to permit such a presence cannot constitute an unfair labor practice. Of course, the parties may choose to negotiate

26. *Abex Corp.*, 162 NLRB 328 (1966).

the subject, as in *Western Electric Co.*, 198 NLRB No. 82 (1972), and thus become bound to their contractual commitments. However, absent such a voluntary act, there exists no right whose denial gives rise to unlawful conduct.

Independently of the question whether a union's presence at purely investigatory interviews constitutes a non-mandatory bargaining subject, the same considerations urged on behalf of that result also support the conclusion that as a matter of sound policy the rule involved herein be rejected by this Court as effecting an unnecessary imbalance between management's legitimate interests and employees' legitimate needs.

Thus, available contractual and statutory remedies are more than adequate to protect employees from the invasion by employers of their legitimate interests during investigatory interviews. Since the information derived from such interviews is essential to employers' ability to manage, and since twenty-five years of experience demonstrates the sufficiency of the Board's former rule in safeguarding the interests of all parties, the Board's current effort to amend that rule should be judicially rejected.

In addition to causing an imbalance in the proper resolution of conflicting interests, the Board's newly adopted rule is inconsistent with Section 203(d) of the Labor Act and subsequent developments in Board law which implemented that Section.

Section 203(d), in pertinent part, provides as follows:

> "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."

In the instant cases the parties have, through negotiation, agreed to final and binding arbitration to adjust disputes such as occurred in these cases. It would appear that adherence to the Congressional will codified in Section 203(d) would dictate that the Board leave to the parties' agreed contractual procedures the resolution of their respective rights in this area. The Board's

earlier decision in *Western Electric, supra,* indicated the Board's disposition to do so. The body of law which the Board has evolved as a consequence of its decision in *Collyer Insulated Wire,*[27] in which the Board announced its intention to defer to the parties' mutually chosen contractual remedies, constituted a similar instance in which the Board gave effect to the legislative mandate contained in Section 203(d). Therefore, application by the Board in these cases of its current interpretation of Section 7 ignores the parties' agreement, violates Section 203(d) and conflicts with its own decisions in *Western Electric* and *Collyer.*

While in the cases below, for reasons urged *supra,* the Board may not alter long-standing precedents and now require an employer to permit union representation during investigatory interviews, there exists an independent reason for this Court to repudiate these Board decisions. In *Quality* the Board has engaged in the meritricious practice of retroactively imposing its new rule so that an employer's conduct, lawful before the issuance of that decision pursuant to rules then in effect, was rendered illegal because of that decision. This practice must be discouraged by this Court if the administrative process is to enjoy the respect and esteem necessary for it to function properly.

Accordingly, and apart from all other matters relating to the legitimacy of the rule the Board would impose in these cases, this Court is urged to reject the Board's attempt to convert retroactively into unlawful conduct efforts to observe existing rules which were lawful when pursued.

27. 192 NLRB No. 150, 77 LRRM 1931 (1971).

CONCLUSION.

For the reasons stated herein, together with those raised by the employers, this Court is urged to declare that the rule of law adopted by the Board and challenged here is the product of an impermissible construction of the Act, and to affirm the decisions of the courts below.

Respectfully submitted,

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SEP 20
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-765

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, UPPER SOUTH DEPARTMENT, AFL-CIO, *Petitioner*

v.

QUALITY MANUFACTURING COMPANY AND NATIONAL LABOR RELATIONS BOARD

On Writ of Certiorari to the United States Court of Appeals For The Fourth Circuit

No. 73-1363

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

J. WEINGARTEN, INC.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF PETITIONER IN NO. 73-765 IN OPPOSITION TO MOTION OF CHAMBER OF COMMERCE FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

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BRIEF OF PETITIONER IN NO. 73-765 IN OPPOSITION TO MOTION OF CHAMBER OF COMMERCE FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Petitioner in No. 73-765 opposes the motion of the Chamber of Commerce for leave to file a brief as *amicus curiae* in support of the position of Quality

Manufacturing Company in No. 73-765 and of J. Weingarten, Inc. in No. 73-1363. The petitions for writs of certiorari in each case were granted on the same day (April 29, 1974), present a common question, and were "set for oral argument in tandem."

The proffered *amicus* brief is altogether out of time. Rule 42(2) of this Court's Rules provides that an *amicus* brief shall be "presented within the time allowed for the filing of the brief of the party supported." Quality and Weingarten each filed their briefs on August 12, 1974. The *amicus* brief and the attached motion for leave to file it were not submitted until September 16, 1974, more than a month after the briefs of the parties to be supported had already been filed.

No reason justifying so untimely a filing is given. The petitions were granted on April 29, 1974, more than four and one-half months ago, and the briefs of the parties to be supported were filed August 12, 1974, more than a month ago. There was thus ample opportunity to present a timely brief.

While we fully appreciate the need to accommodate busy counsel, no reason is stated in the motion to extenuate the untimeliness of the brief. On the contrary, untimeliness has become a litigating habit with the Chamber of Commerce.[1] Respect for the obligation to achieve moderate compliance with the requirements of Rule 42(2) can only be inculcated by denying

[1] See pages 3-4 of the Memorandum In Opposition To Motion Of Chamber of Commerce For Leave To File Brief Amicus Curiae in *Florida Power & Light Co.* v. *I.B.E.W.*, and *N.L.R.B.* v. *I.B.E.W.*, Nos. 73-556 and 73-795. We are informed that the Chamber's motion to file an out-of-time *amicus* brief was denied in those cases.

habitual motions, unexplained and unjustified, for leave to file untimely *amicus* briefs.

For these reasons the motion for leave to file a brief as *amicus curiae* should be denied.

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September, 1974

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

NATIONAL LABOR RELATIONS BOARD *v.* J. WEINGARTEN, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 73–1363. Argued November 18, 1974—
Decided February 19, 1975

During the course of an investigative interview at which an employee of respondent was being interrogated by a representative of respondent employer about reported thefts at respondent's store, the employee asked for but was denied the presence at the interview of her union representative. The union thereupon filed an unfair labor practice charge with the National Labor Relations Board (NLRB). In accordance with its construction in *Mobil Oil Corp.*, 196 N. L. R. B. 1052, enforcement denied, 482 F. 2d 842, and *Quality Mfg. Co.*, 195 N. L. R. B. 195, enforcement denied, 481 F. 2d 1018, reversed, *post*, p. —, the NLRB held that the employer had committed an unfair labor practice and issued a cease-and-desist order, which, however, the Court of Appeals subsequently refused to enforce, concluding that an employee has no "need" for union assistance at an investigative interview. *Held:* The employer violated § 8 (a)(1) of the National Labor Relations Act because it interfered with, restrained, and coerced the individual right of an employee, protected by § 7, "to engage in . . . concerted activities for mutual aid or protection . . .," when it denied the employee's request for the presence of her union representative at the investigative interview that the employee reasonably believed would result in disciplinary action. Pp. 5–17.

(a) The NLRB's holding is a permissible construction of "concerted activities . . . for mutual aid or protection" by the agency charged by Congress with enforcement of the Act. Pp. 9–12.

(b) The NLRB has the "special function of applying the general provisions of the Act to the complexities of industrial life,"

Syllabus

NLRB v. *Erie Resistor Corp.*, 373 U. S. 211, 236, and its special competence in this field is the justification for the deference accorded its determination. Pp. 12–16.

485 F. 2d 1135, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which DOUGLAS, WHITE, MARSHALL, BLACKMUN, and REHNQUIST, JJ., joined. BURGER, C. J., filed a dissenting opinion. POWELL, J., filed a dissenting opinion, in which STEWART, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 73–1363

National Labor Relations Board, Petitioner, v. J. Weingarten, Inc.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[February 19, 1975]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The National Labor Relations Board held in this case that respondent employer's denial of an employee's request that her union representative be present at an investigatory interview which the employee reasonably believed might result in disciplinary action constituted an unfair labor practice in violation of § 8 (a)(1) of the National Labor Relations Act,[1] because it interfered with, restrained and coerced the individual right of the employee, protected by § 7 of the Act, "to engage in . . . concerted activities for . . . mutual aid or protection . . . ."[2]

[1] Section 8(a)(1) provides that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title." 29 U. S. C. § 158 (a)(1).

[2] Section 7, 29 U. S. C. § 157, provides:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a)(3) of this title."

202 N. L. R. B. 446 (1973). The Court of Appeals for the Fifth Circuit held that this was an impermissible construction of § 7 and refused to enforce the Board's order that directed respondent to cease and desist from requiring any employee to take part in an investigatory interview without union representation if the employee requests representation and reasonably fears disciplinary action. 485 F. 2d 1135 (1973).[3] We granted certiorari and set the case for oral argument with No. 73–765, *ILGWU* v. *Quality Mfg. Co. et al.*, *post*, p. —, 416 U. S. 969 (1974). We reverse.

I

Respondent operates a chain of some 100 retail stores with lunch counters at some, and so-called lobby food

[3] Accord: *NLRB* v. *Quality Manufacturing Co.*, 481 F. 2d 1018 (CA4 1973), reversed, *ILGWU* v. *Quality Mfg. Co. Inc.*, No. 73–765, *post*, p. —; *NLRB* v. *Mobil Oil Corp.*, 482 F. 2d 842 (CA7 1973). The issue is a recurring one. In addition to this case and No. 73–765, *post*, p. —, see *Western Electric Co.*, 205 N. L. R. B. 46 (1973); *New York Telephone Co.*, 203 N. L. R. B. 180 (1973); *National Can Corp.*, 200 N. L. R. B. 1116 (1972); *Western Electric Co.*, 198 N. L. R. B. 82 (1972); *Mobil Oil Corp.*, 196 N. L. R. B. 1052 (1972), enforcement denied, 482 F. 2d 842 (CA7 1973); *Lafayette Radio Electronics*, 194 N. L. R. B. 491 (1971); *Illinois Bell Telephone Co.*, 192 N. L. R. B. 834 (1971); *United Aircraft Corp.*, 179 N. L. R. B. 935 (1969), aff'd on another ground, 440 F. 2d 85 (CA2 1971); *Texaco, Inc.*, 179 N. L. R. B. 976 (1969); *Wald Manufacturing Co.*, 176 N. L. R. B. 839 (1959), aff'd on other grounds, 426 F. 2d 1328 (CA6 1970); *Dayton Typographic Service, Inc.*, 176 N. L. R. B. 357 (1969); *Jacobe-Pearson Ford, Inc.*, 172 N. L. R. B. 594 (1968); *Chevron Oil Co.*, 168 N. L. R. B. 574 (1967); *Texaco, Inc.*, 168 N. L. R. B. 361 (1967), enforcement denied, 408 F. 2d 142 (CA5 1969); *Electric Motors & Specialties, Inc.*, 149 N. L. R. B. 1432 (1964); *Dobbs Houses, Inc.*, 145 N. L. R. B. 1565 (1964); *Ross Gear & Tool Co.*, 63 N. L. R. B. 1012 (1945), enforcement denied, 158 F. 2d 607 (CA7 1947). See generally Brodie, "Union Representation and the Disciplinary Interview," 15 B. C. Ind. & Comm. L. Rev .1 (1973); Note, "Union Presence in Disciplinary Meetings," 41 U. Chi. L. Rev. 329 (1974).

operations at others, dispensing food to take out or eat on the premises. Respondent's sales personnel are represented for collective-bargaining purposes by Retail Clerks Union, Local 455. Leura Collins, one of the sales personnel, worked at the lunch counter at Store No. 2 from 1961 to 1970 when she was transferred to the lobby operation at Store No. 98. Respondent maintains a companywide security department staffed by "Loss Prevention Specialists" who work undercover in all stores to guard against loss from shoplifting and employee dishonesty. In June 1972, "Specialist" Hardy, without the knowledge of the Store Manager, spent two days observing the lobby operation at Store No. 98 investigating a report that Collins was taking money from a cash register. When Hardy's surveillance of Collins at work turned up no evidence to support the report, Hardy disclosed his presence to the Store Manager and reported that he could find nothing wrong. The Store Manager then told him that a fellow lobby employee of Collins had just reported that Collins had purchased a box of chicken that sold for $2.98, but had placed only $1.00 in the cash register. Collins was summoned to an interview with Specialist Hardy and the Store Manager, and Hardy questioned her. The Board found that several times during the questioning she asked the Store Manager to call the union shop steward or some other union representative to the interview, and that her requests were denied. Collins admitted that she had purchased some chicken, a loaf of bread and some cake which she said she paid for and donated to her church for a church dinner. She explained that she purchased four pieces of chicken for which the price was $1.00, but that because the lobby department was out of the small size boxes in which such purchases were usually packaged she put the chicken into the larger box normally used for packaging larger quantities. Specialist Hardy left the interview to check Collins' explana-

tion with the fellow employee who had reported Collins. This employee confirmed that the lobby department had run out of small boxes and also said that she did not know how many pieces of chicken Collins had put in the larger box. Specialist Hardy returned to the interview, told Collins that her explanation had checked out, that he was sorry if he had inconvenienced her, and that the matter was closed.

Collins thereupon burst into tears and blurted out that the only thing she had ever gotten from the store without paying for it was her free lunch. This revelation surprised the Store Manager and Hardy because, although free lunches had been provided at Store No. 2 when Collins worked at the lunch counter there, company policy was not to provide free lunches at stores operating lobby departments. In consequence, the Store Manager and Specialist Hardy closely interrogated Collins about violations of the policy in the lobby department at Store No. 98. Collins again asked that a shop steward be called to the interview, but the Store Manager denied her request. Based on her answers to his questions, Specialist Hardy prepared a written statement which included a computation that Collins owed the store approximately $160 for lunches. Collins refused to sign the statement. The Board found that Collins, as well as most, if not all, employees in the lobby department of Store No. 98, including the manager of that department, took lunch from the lobby without paying for it, apparently because no contrary policy was ever made known to them. Indeed, when Company headquarters advised Specialist Hardy by telephone during the interview that headquarters itself was uncertain whether the policy against providing free lunches at lobby departments was in effect at Store No. 98, he terminated his interrogation of Collins. The Store Manager asked Collins not to discuss the matter with anyone because he considered it a

private matter between her and the Company, of no concern to others. Collins, however, reported the detail of the interview fully to her shop steward and other union representatives, and this unfair labor practice proceeding resulted.[4]

II

The Board's construction that § 7 creates a statutory right in an employee to refuse to submit without union representation to an interview which he reasonably fears may result in his discipline was announced in its Decision and Order of January 28, 1972, in *Quality Mfg. Co.*, 195 N. L. R. B. 195, considered in No. 73-765, *ILGWU* v. *Quality Mfg. Co. et al.*, *post*, p. —. In its opinions in that case and in *Mobil Oil Corp.*, 196 N. L. R. B. 1052, decided May 12, 1972, three months later, the Board shaped the contours and limits of the statutory right.

First, the right inheres in § 7's guarantee of the right of employees to act in concert for mutual aid and protection. In *Mobil Oil*, the Board stated:

> "An employee's right to union representation upon request is based on Section 7 of the Act which guarantees the right of employees to act in concert for 'mutual aid and protection.' The denial of this right has a reasonable tendency to interfere with, restrain, and coerce employees in violation of Section 8 (a)(1) of the Act. Thus, it is a serious violation of the employee's individual right to engage in concerted activity by seeking the assistance of his

[4] The charges also alleged that respondent had violated § 8 (a)(5) by unilaterally changing a condition of employment when the day after the interview, respondent ordered discontinuance of the free lunch practice. Because respondent's action was an arbitrable grievance under the collective-bargaining agreement, the Board, pursuant to the deferral-to-arbitration policy adopted in *Collyer Insulated Wire*, 192 N. L. R. B. 837 (1971), "dismissed" the § 8 (a)(5) allegation. No issue involving that action is before us.

> statutory representative if the employer denies the employee's request and compels the employee to appear unassisted at an interview which may put his job security in jeopardy. Such a dilution of the employee's right to act collectively to protect his job interests is, in our view, unwarranted interference with his right to insist on concerted protection, rather than individual self-protection, against possible adverse employer action." 196 N. L. R. B., *supra*, at 1052.

Second, the right arises only in situations where the employee requests representation. In other words, the employee may forego his guaranteed right and, if he prefers, participate in an interview unaccompanied by his union representative.

Third, the employee's right to request representation as a condition of participation in an interview is limited to situations where the employee reasonably believes the investigation will result in disciplinary action.[5] Thus the Board stated in *Quality*:

"We would not apply the rule to such run-of-the-

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[5] The Board stated in *Quality*, " 'Reasonable ground' will of course be measured, as here, by objective standards under all the circumstances of the case." 195 N. L. R. B., *supra*, at 198 n. 3. In *NLRB* v. *Gissel Packing Co.*, 395 U. S. 575, 608 (1969), the Court announced that it would "reject any rule that requires a probe of an employee's subjective motivations as involving an endless and unreliable inquiry," and we reaffirm that view today as applicable also in the context of this case. Reasonableness, as a standard, is prescribed in several places in the Act itself. *E.g.*, an employer is not relieved of responsibility for discrimination against an employee "if he has reasonable grounds for believing" that certain facts exist, § 8 (a) (3) (A), (B), 29 U. S. C. § 158 (a) (3) (A), (B); also, preliminary injunctive relief against certain conduct must be sought if "the officer or regional attorney to whom the matter may be referred has reasonable cause to believe" such charge is true, § 10 (1), 29 U. S. C. § 160 (1). See also *Congoleum Industries, Inc.*, 197

> mill shop-floor conversations as, for example, the giving of instructions or training or needed corrections of work techniques. In such cases there cannot normally be any reasonable basis for an employee to fear that any adverse impact may result from the interview, and thus we would then see no reasonable basis for him to seek the assistance of his representative." 195 N. L. R. B., *supra*, at 199.

Fourth, exercise of the right may not interfere with legitimate employer prerogatives. The employer has no obligation to justify his refusal to allow union representation, and despite refusal, the employer is free to carry on his inquiry without interviewing the employee, and thus leave to the employee the choice between having an interview unaccompanied by his representative, or having no interview and foregoing any benefits that might be derived from one. As stated in *Mobil Oil:*

> "The employer may, if he wishes, advise the employee that it will not proceed with the interview unless the employee is willing to enter the interview unaccompanied by his representative. The employee may then refrain from participating in the interview, thereby protecting his right to representation, but at the same time relinquishing any benefit which might be derived from the interview. The employer would then be free to act on the basis of

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N. L. R. B. 534 (1972); *Cumberland Shoe Corp.*, 144 N. L. R. B. 1268 (1963), enforced, 351 F. 2d 917 (CA6 1965).

The key objective fact in this case is that the only exception to the requirement in the collective-bargaining agreement that the employer give a warning notice prior to discharge is "if the cause of such discharge is dishonesty." Accordingly, had respondent been satisfied, based on its investigatory interview, that Collins was guilty of dishonesty, Collins could have been discharged without further notice. That she might reasonably believe that the interview might result in disciplinary action is thus clear.

information obtained from other sources." 196 N. L. R. B., *supra*, at 1052.

The Board explained in *Quality*

> "This seems to us to be the only course consistent with all of the provisions of our Act. It permits the employer to reject a collective course in situations such as investigative interviews where a collective course is not required but protects the employee's right to protection by his chosen agents. Participation in the interview is then voluntary, and, if the employee has reasonable ground to fear that the interview will adversely affect his continued employment, or even his working conditions, he may choose to forego it unless he is afforded the safeguard of his representative's presence. He would then also forego whatever benefit might come from the interview. And, in that event, the employer would, of course, be free to act on the basis of whatever information he had and without such additional facts as might have been gleaned through the interview." 195 N. L. R. B., *supra*, at 198–199.

Fifth, the employer has no duty to bargain with any union representative who may be permitted to attend the investigatory interview. The Board said in *Mobil*, "we are not giving the Union any particular rights with respect to predisciplinary discussions which it otherwise was not able to secure during collective-bargaining negotiations." 196 N. L. R. B., *supra*, at 1052 n. 3. The Board thus adhered to its decisions distinguishing between disciplinary and investigatory interviews, imposing a mandatory affirmative obligation to meet with the union representative only in the case of the disciplinary interview. *Texaco, Inc.*, 168 N. L. R. B. 361 (1967); *Chevron Oil Co.*, 168 N. L. R. B. 574 (1967); *Jacobe-Pearson Ford*, 172 N. L. R. B. 594 (1968). The employer

has no duty to bargain with the Union representative at an investigatory interview. "The representative is present to assist the employee, and may attempt to clarify the facts or suggest other employees who may have knowledge of them. The employer, however, is free to insist that he is only interested, at that time, in hearing the employee's own account of the matter under investigation." Board's Brief, at 22.

III

The Board's holding is a permissible construction of "concerted activities . . . for mutual aid of protection" by the agency charged by Congress with enforcement of the Act, and should have been sustained.

The action of an employee in seeking to have the assistance of his union representative at a confrontation with his employer clearly falls within the literal wording of § 7 that "[e]mployees shall have the right . . . to engage in . . . concerted activities for the purpose of . . . mutual aid or protection." *Mobil Oil Corp.* v. *NLRB*, 487 F. 2d 842, 846 (1973). This is true even though the employee alone may have an immediate stake in the outcome; he seeks "aid or protection" against a perceived threat to his employment security. The union representative whose participation he seeks is however safeguarding not only the particular employee's interest, but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly.[6] The representative's presence is an

[6] "The quantum of proof that the employer considers sufficient to support disciplinary action is of concern to the entire bargaining unit. A slow accretion of custom and practice may come to control the handling of disciplinary disputes. If, for example, the employer adopts a practice of considering foreman's unsubstantiated statements sufficient to support disciplinary action, employee protection

assurance to other employees in the bargaining unit that they too can obtain his aid and protection if called upon to attend a like interview. Concerted activity for mutual aid or protection is therefore as present here as it was held to be in *NLRB* v. *Peter Cailler Kohler Swiss Chocolates Co.*, 130 F. 2d 503, 505–506 (1942), cited with approval by this Court in *Houston Insulation Contractors Assn.* v. *NLRB*, 386 U. S. 664, 668–669 (1967):

> "When all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his support, they engage in a 'concerted activity' for 'mutual aid or protection,' although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity so established is 'mutual aid' in the most literal sense, as nobody doubts."

The Board's construction plainly effectuates the most fundamental purposes of the Act. In § 1, 29 U. S. C. § 151, the Act declares that it is a goal of national labor policy to protect "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of . . . mutual aid or protection." To that end the Act is designed to eliminate the "inequality of bargaining power between employees . . . and employers." *Ibid.* Requiring a lone employee to attend an investigatory interview which he reasonably believes may result in the imposition

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against unwarranted punishment is affected. The presence of a union steward allows protection of this interest by the bargaining representative." Comment, Union Presence in Disciplinary Meetings, 41 U. Chi. L. Rev. 329, 338 (1974).

of discipline perpetuates the inequality the Act was designed to eliminate, and bars recourse to the safeguards the Act provided "to redress the perceived imbalance of economic power between labor and management." *American Ship Building Co.* v. *NLRB*, 380 U. S. 300, 316 (1965). Viewed in this light, the Board's recognition that § 7 guarantees an employee's right to the presence of a union representative at an investigatory interview in which the risk of discipline reasonably inheres is within the protective ambit of the section "read in light of the mischief to be corrected and the end to be attained." *NLRB* v. *Hearst Publications, Inc.*, 322 U. S. 111, 124 (1944).

The Board's construction also gives recognition to the right when it is most useful to both employee and employer.[7] A single employee confronted by an employer

[7] See, *e. g.*, *Independent Lock Co.*, 30 L. A. 744, 746 (1958):

"[Participation by the union representative] might reasonably be designed to clarify the issues at this first stage of the existence of a question, to bring out the facts and the policies concerned at this stage, to give assistance to employees who may lack the ability to express themselves in their cases, and who, when their livelihood is at stake, might in fact need the more experienced kind of counsel which their union steward might represent. The foreman, himself, may benefit from the presence of the steward by seeing the issue, the problem, the implications of the facts, and the collective bargaining clause in question more clearly. Indeed, good faith discussion at this level may solve many problems, and prevent needless hard feelings from arising. . . . [It] can be advantageous to both parties if they both act in good faith and seek to discuss the question at this stage with as much intelligence as they are capable of bringing to the problem."

See also *Caterpillar Tractor Co.*, 44 L. A. 647, 651 (1965):

"The procedure . . . contemplates that the steward will exercise his responsibility and authority to discourage grievances where the action on the part of management appears to be justified. Similarly, there exists the responsibility upon management to withhold disciplinary action, or other decisions affecting the employees, where

investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors. A knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview. Certainly his presence need not transform the interview into an adversary contest. Respondent suggests nonetheless that union representation at this stage is unnecessary because a decision as to employee culpability or disciplinary action can be corrected after the decision to impose discipline has become final. In other words, respondent would defer representation until the filing of a formal grievance challenging the employer's determination of guilt after the employee has been discharged or otherwise disciplined.[8] At that point, however, it becomes increasingly difficult for the employee to vindicate himself, and the value of representation is correspondingly diminished. The employer may then be more concerned with justifying his actions than re-examining them.

IV

The Court of Appeals rejected the Board's construction as foreclosed by that Court's decision four years earlier in

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it can be demonstrated at the outset that such action is unwarranted. The presence of the union steward is regarded as a factor conducive to the avoidance of formal grievances through the medium of discussion and persuasion conducted at the threshold of an impending grievance. It is entirely logical that the steward will employ his office in appropriate cases so as to limit formal grievances to those which involve differences of substantial merit. Whether this objective is accomplished will depend on the good faith of the parties, and whether they are amenable to reason and persuasion."

[8] 1 CCH LAB. L. REP., Union Contracts, Arbitration ¶ 59, 520, at 84,988–84,989.

Texaco, Inc. Houston Producing Division v. *NLRB*, 408 F. 2d 142 (1969), and by "a long line of Board decisions, each of which indicates—either directly or indirectly—that no union representative need be present" at an investigatory interview. 485 F. 2d, at 1137.

The Board distinguishes *Texaco* as presenting not the question whether the refusal to allow the employee to have his union representative present constituted a violation of § 8 (a)(1) but rather the question whether § 8 (a)(5) precluded the employer from refusing to deal with the union. We need not determine whether *Texaco* is distinguishable. Insofar as the Court of Appeals there held that an employer does not violate § 8(a)(1) if he denies an employee's request for union representation at an investigative interview, and requires him to attend the interview alone, our decision today reversing the Court of Appeals' judgment based upon *Texaco* supersedes that holding.

In respect of its own precedents, the Board asserts that even though some "may be read as reaching a contrary conclusion," they should not be treated as impairing the validity of the Board's construction, because "[t]hese decisions do not reflect a considered analysis of the issue." Board's Brief, at 25.[9] In that circumstance, and in the light of significant developments in industrial life believed by the Board to have warranted a reappraisal of the ques-

[9] The precedents cited by the Court of Appeals are: *Illinois Bell Telephone Co.*, 192 N. L. R. B. 834 (1971); *Texaco, Inc., Los Angeles Terminal*, 179 N. L. R. B. 976 (1969); *Wald Manufacturing Co.*, 176 N. L. R. B. 839, aff'd, 426 F. 2d 1328 (CA6 1970); *Dayton Typographic Service, Inc.*, 176 N. L. R. B. 357 (1969); *Jacobe-Pearson Ford, Inc.*, 172 N. L. R. B. 594 (1968); *Chevron Oil Co.*, 168 N. L. R. B. 574 (1967); *Dobbs Houses, Inc.*, 145 N. L. R. B. 1565 (1964). See also *NLRB* v. *Ross Gear & Tool Co.*, 158 F. 2d 607 (CA7 1947).

tion,[10] the Board argues that the case is one where "[t]he nature of the problem, as revealed by unfolding variant situations, inevitably involves an evolutionary process for its rational response, not a quick, definitive formula as a comprehensive answer. And so, it is not surprising that the Board has more or less felt its way . . . and has modified and reformed its standards on the basis of accumulating experience." *IUEW* v. *NLRB*, 366 U. S. 667, 674 (1961).

We agree that its earlier precedents do not impair the validity of the Board's construction. That construction in no wise exceeds the reach of § 7, but falls well within the scope of the rights created by that section. The use by an administrative agency of the evolutional approach is particularly fitting. To hold that the Board's earlier decisions froze the development of this important aspect of the national labor law would misconceive the nature of administrative decisionmaking. " 'Cumulative experience' begets understanding and insight by which judgments . . . are validated or qualified or invalidated. The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differenti-

[10] "There has been a recent growth in the use of sophisticated techniques—such as closed circuit television, undercover security agents, and lie detectors—to monitor and investigate the employees' conduct at their place of work. See, *e. g.*, *Warwick Electronics, Inc.*, 46 L. A. 95, 97–98 (1966); *Bowman Transportation, Inc.*, 56 L. A. 283, 286–292 (1972); *FMC Corp.*, 46 L. A. 335, 336–338 (1966). These techniques increase not only the employees' feelings of apprehension, but also their need for experienced assistance in dealing with them. Thus, often, as here and in *Mobil*, *supra*, an investigative interview is conducted by security specialists; the employee does not confront a supervisor who is known or familiar to him, but a stranger trained in interrogation techniques. These developments in industrial life warrant a concomitant reappraisal by the Board of their impact on statutory rights. Cf. *Boys Markets, Inc.* v. *Retail Clerks, Local 770*, 398 U. S. 235, 250." Board's Brief, at 27 n. 22.

ates perhaps more than anything else the administrative from the judicial process." *NLRB* v. *Seven-Up Bottling Co.*, 344 U. S. 344, 349 (1953).

The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board. The Court of Appeals impermissibly encroached upon the Board's function in determining for itself that an employee has no "need" for union assistance at an investigatory interview. "While a basic purpose of section 7 is to allow employees to engage in concerted activities for their mutual aid and protection, such a need does not arise at an investigatory interview." 485 F. 2d, *supra*, at 1138. It is the province of the Board, not the courts, to determine whether or not the "need" exists in light of changing industrial practices and the Board's cumulative experience in dealing with labor-management relations. For the Board has the "special function of applying the general provisions of the Act to the complexities of industrial life," *NLRB* v. *Erie Resistor Corp.*, 373 U. S. 211, 236 (1963); *Republic Aviation Corp.* v. *NLRB*, 324 U. S. 793, 798 (1945); *Phelps Dodge Corp.* v. *NLRB*, 313 U. S. 177, 196–197 (1941), and its special competence in this field is the justification for the deference accorded its determination. *American Ship Building Co.* v. *NLRB*, 380 U. S., *supra*, at 316. Reviewing courts are of course not "to stand aside and rubber stamp" Board determinations that run contrary to the language or tenor of the Act, *NLRB v. Brown*, 380 U. S. 278, 291 (1965). But the Board's construction here, while it may not be required by the Act, is at least permissible under it, and insofar as the Board's application of that meaning engages in the "difficult and delicate responsibility" of reconciling conflicting interests of labor and management, the balance struck by the Board is "subject to limited judicial review." *NLRB* v. *Truck Driver's Union*, 353 U. S. 87, 96 (1957). See also *NLRB* v.

Babcock & Wilcox Co., 351 U. S. 105 (1956); *NLRB* v. *Brown, supra; Republic Aviation Corp.* v. *NLRB, supra.* In sum, the Board has reached a fair and reasoned balance upon a question within its special competence, its newly arrived at construction of § 7 does not exceed the reach of that section, and the Board has adequately explicated the basis of its interpretation.

The statutory right confirmed today is in full harmony with actual industrial practice. Many important collective-bargaining agreements have provisions that accord employees rights of union representation at investigatory interviews.[11] Even where such a right is not explicitly provided in the agreement a "well established current of arbitral authority" sustains the right of union representation at investigatory interviews which the employee reasonably believes may result in disciplinary action against him. *Chevron Chemical Co.*, 60 L. A. 1066, 1071 (1973).[12]

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[11] 1 BNA Collective Bargaining Negotiations and Contracts 21:22 (General Motors Corp. and Auto Workers, ¶ 76 (a)); 27:6 (Goodyear Tire & Rubber Co. and Rubber Workers, Art. V (5)); 28:15 (United States Steel Corp. and United Steelworkers, ¶ 101.2). See, *e. g.*, the Bethlehem Corp. and United Steelworkers Agreement of 1971, Art. XI, § 4 (d), which provided:

"Any Employee who is summoned to meet in an enclosed office with a supervisor for the purpose of discussing possible disciplinary action shall be entitled to be accompanied by the Assistant Grievance Committeeman designated for the area if he requests such representation, provided such representative is available during the shift."

[12] See also Universal Oil Products Co., 60 L. A. 832, 834 (1973): "[A]n employee is entitled to the presence of a Committeeman at an investigatory interview if he requests one and if the employee has reasonable grounds to fear that the interview may be used to support disciplinary action against him." *Allied Paper Co.*, 53 L. A. 226 (1969); *Thrifty Drug Stores Co., Inc.*, 50 L. A. 1253, 1262 (1968); *Waste King Universal Products Co.*, 46 L. A. 283, 286 (1966); *Dallas Morning News*, 40 L. A. 619, 623–624 (1963); *The Arcrods Co.*, 39 L. A. 784, 788–789 (1962); *Valley Iron Works*, 33

The judgment is reversed and the case is remanded with direction to enter a judgment enforcing the Board's order.

L. A. 769, 771 (1960); *Schlitz Brewing Co.*, 33 L. A. 57, 60 (1959); *Singer Mfg. Co.*, 28 L. A. 570 (1957); *Braniff Airways, Inc.*, 27 L. A. 892 (1957); *John Lucas & Co.*, 19 L. A. 334, 346–347 (1952). Contra, *e. g., E. I. duPont de Nemours & Co.*, 29 L. A. 646, 652 (1957); *United Air Lines, Inc.*, 28 L. A. 179, 180 (1956).

SUPREME COURT OF THE UNITED STATES

Nos. 73–1363 AND 73–765

National Labor Relations Board, Petitioner, 73–1363 *v.* J. Weingarten, Inc.	On Writ of Certiorari to the United States Court of Court of Appeals for the Fifth Circuit.
International Ladies' Garment Workers' Union, Upper South Department, AFL–CIO, Petitioner, 73–765 *v.* Quality Manufacturing Company et al.	On Writ of Certiorari to the United States Court of Court of Appeals for the Fourth Circuit.

[February 19, 1975]

MR. CHIEF JUSTICE BURGER, dissenting.

Today the Court states that, in positing a new § 7 right for employees, the "Board has adequately explicated the basis of its interpretation." *Ante*, at 16. I agree that the Board has the power to change its position, but since today's cases represent a major change in policy and a departure from Board decisions spanning almost 30 years the change ought to be justified by a reasoned Board opinion. The brief but spectacular evolution of the right, once recognized, illustrates the problem. In *Quality Mfg. Co.*, 195 N. L. R. B. 197, 198 (1972), the Board distinguished its prior cases on the ground, *inter alia*, that "none of those cases presented a situation where an employee or his representative had been disciplined or discharged for requesting, or insisting on, union representation in the course of an interview." Yet, soon afterwards the Board extended the right without explanation

to situations where no discipline or discharge resulted. *Mobil Oil Corp.*, 196 N. L. R. B. 1052 (1972); *J. Weingarten Co.*, 202 N. L. R. B. 446 (1973).

The tortured history and inconsistency of the Board's efforts in this difficult area suggest the need for an explanation by the Board of why the new rule was adopted. However, a much more basic policy demands that the Board explain its new construction. The integrity of the administrative process requires that "[w]hen the Board so exercises the discretion given to it by Congress, it must 'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it.' *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 197." *Labor Board* v. *Metropolitan Ins. Co.*, 380 U. S. 438, 443 (1965). Here, there may be very good reasons for adopting the new rule, and the Court suggests some. See *ante*, at 9–10 with n. 8; 11–12; 14 n. 10. But these reasons are not to be found in the Board's cases. In *Metropolitan Ins. Co.*, 380 U. S., at 444, we made it clear that "courts may not accept appellate counsel's *post hoc* rationalizations for agency action." The Court today gives lip service to the rule that courts are not "to stand aside and rubber stamp" Board determinations. *Ante*, at 15.

I would therefore remand the cases to the Court of Appeals with directions to remand to the Board so that it may enlighten us as to the reasons for this marked change in policy rather than leave with this Court the burden of justifying the change for reasons which we arrive at by inference and surmise.

SUPREME COURT OF THE UNITED STATES

No. 73-1363

National Labor Relations Board, Petitioner, *v.* J. Weingarten, Inc.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

[February 19, 1975]

MR. JUSTICE POWELL, with whom MR. JUSTICE STEWART joins, dissenting.

Section 7 of the Act guarantees to employees the right to "engage in . . . concerted activities for the purpose of collective bargaining or for other mutual aid or protection." The Court today construes that right to include union representation or the presence of another employee [1] at any interview the employee reasonably fears might result in disciplinary action. In my view, such an interview is not *concerted activity* within the intendment of the Act. An employee's right to have a union representative or another employee present at an investigative interview is a matter that Congress left to the free and flexible exchange of the bargaining process.

The majority opinion acknowledges that the NLRB has only recently discovered the right to union representation in employer interviews. In fact, as late as 1964—after almost 30 years of experience with § 7—the Board flatly rejected an employee's claim that she was entitled to union representation in a "discharge conversation" with the general manager, who later admitted that he

[1] While the Court speaks only of the right to insist on the presence of a union representative, it must be assumed that the § 7 right today recognized, affording employees the right to act "in concert" in employer interviews, also exists in the absence of a recognized union. Cf. *NLRB* v. *Washington Aluminum Co.*, 370 U. S. 9 (1962).

had already decided to fire her. The Board adopted the Trial Examiner's analysis:

> "I fail to perceive anything in the Act which obliges an employer to permit the presence of a representative of the bargaining agent in every situation where an employer is compelled to admonish or otherwise take disciplinary action against an employee, particularly in those situations where the employee's conduct is unrelated to any legitimate union or concerted activity. An employer undoubtedly has the right to maintain day-to-day discipline in the plant or on the working premises and it seems to me that only exceptional circumstances should warrant any interference with this right." *Dobbs Houses, Inc.*, 145 N. L. R. B. 1565, 1571 (1964).[2]

The convoluted course of litigation from *Dobbs Houses* to *Quality Mfg.* hardly suggests that the Board's change of heart resulted from a logical "evolutionary approach." *Ante*, at 14. The Board initially retreated from *Dobbs Houses*, deciding that it only applied to "investigatory" interviews and holding that if the employer already had decided on discipline the union had a § 8 (a)(5) right to attend the interview. *Texaco, Inc., Houston Producing Division*, 168 N. L. R. B. 361 (1967), enforcement denied, 408 F. 2d 142 (CA5 1969). It reasoned that employee

[2] In one earlier case the Board had found a § 8 (a)(1) violation in the employer's refusal to admit a union representative to an interview. *Ross Gear & Tool Co.*, 63 N. L. R. B. 1012, 1033–1034 (1945), enforcement denied, 158 F. 2d 607, 611–614 (CA7 1947). In that case, however, the Board found that the employee, a union committee member, was called in to discuss a pending union issue. The Board found that discharging her for insisting on the presence of the entire committee was a discriminatory discharge under § 8 (a)(1). The opinion in *Dobbs Houses* distinguished *Ross Gear* on the ground that the matter under investigation was protected union activity. 145 N. L. R. B., at 1571.

discipline sufficiently affects a "term or condition of employment" to implicate the employer's obligation to consult with the employee's bargaining representative, and that direct dealing with an employee on an issue of discipline violated § 8 (a)(5).[3] For several years, the Board adhered to its distinction betwen "investigative" and "disciplinary" interviews, dismissing claims under both § 8 (a)(1) and § 8 (a)(5) in the absence of evidence that the employer had decided to discipline the employee.[4]

Quality Mfg. was the first case in which the Board perceived any greater content in § 7. It did so, not by relying on "significant developments in industrial life," *ante*, at 13, but by stating simply that in none of the earlier cases had a worker been fired for insisting on union representation. The Board also asserted, for the first time, that its earlier decisions had disposed of only the union's right to bargain with the employer over the discipline to be imposed, and had not dealt with the employee's right under § 7 to insist on union presence at meetings that he reasonably fears would lead to disciplinary action. 195 N. L. R. B., at 198. Even this distinction was aban-

[3] The Board has not been called upon to pursue its § 8 (a)(5) theory to its logical conclusion. Its determination that all disciplinary decisions are matters that invoke the employer's mandatory duty to bargain would seem to suggest that, absent some qualification of the duty contained in the collective-bargaining agreement, federal law will now be read to require that the employer bargain to impasse before initiating unilateral action on disciplinary matters. It is difficult to believe that Congress intended such a radical restriction of the employer's power to discipline employees. See *Fibreboard Corp.* v. *NLRB*, 379 U. S. 203, 217, 218, 223 (STEWART, J., concurring).

[4] *Lafayette Radio Electronics*, 194 N. L. R. B. 491 (1971); *Illinois Bell Telephone Co.*, 192 N. L. R. B. 834 (1971); *Texaco, Inc., Los Angeles Sales Terminal*, 179 N. L. R. B. 976 (1969); *Jacobe-Pearson Ford, Inc.*, 172 N. L. R. B. 594 (1968); *Chevron Oil Co.*, 168 N. L. R. B. 574 (1967).

doned some four months later in *Mobil Oil Corp.*, 196 N. L. R. B. 1052 (1972), enforcement denied, 482 F. 2d 482 (CA7 1973). There the Board followed *Quality Mfg.*, even though the employees in *Mobil Oil* had not been fired for insisting on union representation and their only claim was that the employer had excluded the union from an investigatory interview. Thus, the Board has turned its back on *Dobbs Houses* and now finds a § 7 right to insist on union presence in the absence of any evidence that the employer has decided to embark on a course of discipline.

Congress' goal in enacting federal labor legislation was to create a framework within which labor and management can establish the mutual rights and obligations that govern the employment relationship. "The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about adjustment and agreements which the Act itself does not attempt to compel." *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45 (1937). The National Labor Relations Act only creates the structure for the parties' exercise of their respective economic strengths; it leaves definition of the precise contours of the employment relationship to the collective-bargaining process. See *H. K. Porter* v. *NLRB*, 397 U. S. 99, 108 (1970); *NLRB* v. *American National Insurance Co.*, 343 U. S. 395, 402 (1952).

As the Court noted in *Emporium Capwell* v. *Western Addition Community Organization*, § 7 guarantees employees' basic rights of industrial self-organization, rights which are for the most part "collective rights . . . to act in concert with one's fellow employees, [which] are protected, not for their own sake, but as instruments of the national labor policy of minimizing industrial strife 'by encouraging the practice and procedure of collective

bargaining.'" — U. S. —, — (1975). Section 7 protects those rights that are essential to employee self-organization and to the exercise of economic weapons to exact concessions from management and demand a voice in defining the terms of the employment relationship.[5] It does not define those terms itself.

The power to discipline or discharge employees has been recognized uniformly as one of the elemental prerogatives of management. Absent specific limitations imposed by statute[6] or through the process of collective bargaining,[7] management remains free to discharge employees at will. See *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 583 (1960). An employer's need to consider and undertake disciplinary action will arise in a wide variety of unpredictable situations. The appropriate disciplinary response also will

[5] By contrast, the employee's § 7 right announced today may prove to be of limited value to the employee or to the stabilization of labor relations generally. The Court appears to adopt the Board's view that investigative interviews are not bargaining sessions and that the employer legitimately can insist on hearing only the employee's version of the facts. Absent employer invitation, it would appear that the employee's § 7 right does not encompass the right to insist on the participation of the person he brings with him to the investigative meeting. The new right thus appears restricted to the privilege to insist on the mute and inactive presence of a fellow employee or a union representative; a witness to the interview, perhaps.

[6] Section 8 (a)(1) forbids employers to take disciplinary actions that "interfere with, restrain, or coerce" the employee's exercise of § 7 rights. Other federal statutes also limit in certain respects the employer's basic power to discipline and discharge employees. See, *e. g.*, Title VII, 42 U. S. C. § 2000e–5; Age Discrimination in Employment Act, 29 U. S. C. § 623.

[7] The Board and the courts have recognized that union demands for provisions limiting the employer's power to discharge can be the subject of mandatory bargaining. See *Fibreboard Corp.* v. *NLRB*, 379 U. S. 203, 217, 221–223 (STEWART, J., concurring).

vary significantly, depending on the nature and severity of the employee's conduct. Likewise, the nature and amount of information required for determining the appropriateness of disciplinary action may vary with the severity of the possible sanction and the complexity of the problem. And in some instances, the employer's legitimate need to maintain discipline and security may require an immediate response.

This variety and complexity necessarily calls for flexible and creative adjustment. As the Court recognizes, *ante*, at 16, the question of union participation in investigatory interviews is a standard topic of collective bargaining.[8] Many agreements incorporate provisions that grant and define such rights, and arbitration decisions increasingly have begun to recognize them as well. Rather than vindicate the Board's interpretation of § 7, however, these developments suggest to me that union representation at investigatory interviews is a matter that Congress left to the bargaining process. Even after affording appropriate deference to the Board's meandering interpretation of the Act, I conclude that the right announced

[8] The history of a similar case, *Mobil Oil*, 196 N. L. R. B. 144 (1972), enforcement denied, 482 F. 2d 842 (CA7 1973), illustrates how the Board has substituted its judgment for that of the collective-bargaining process. During negotiations leading to the establishment of a collective-bargaining agreement in that case, the union advanced a demand that existing provisions governing suspension and discharge be amended to provide for company-union discussions prior to disciplinary action. The employer refused to accede to that demand and ultimately prevailed, only to find his efforts at the bargaining table voided by the Board's interpretation of the statute.

Chairman Miller subsequently suggested that the union can waive the employee's § 7 right to the presence of a union representative. See *Western Electric Co.*, 198 N. L. R. B. 82 (1972). The Court today provides no indication whether such waivers in the collective-bargaining process are permissible. Cf. *NLRB* v. *Magnavox Co.*, 415 U. S. 322 (1974).

today is not among those that Congress intended to protect in § 7. The type of personalized interview with which we are here concerned is simply not "concerted activity" within the meaning of the Act.